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PROPOSITION DU GROUPE DE TRAVAIL SUR LA LOI APPLICABLE AUX OBLIGATIONS ALIMENTAIRES

Rapport présenté à la Commission spéciale

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PROPOSAL BY THE WORKING GROUP ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

Report presented to the Special Commission

Document préliminaire No 14 de mars 2005
à l'intention de la Commission spéciale d'avril 2005
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille

Preliminary Document No 14 of March 2005
for the attention of the Special Commission of April 2005
on the International Recovery of Child Support
and other Forms of Family Maintenance

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Introduction

1. The Working Group on the Law Applicable to Maintenance Obligations (hereafter "the WG") established by the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance of May 2003 proceeded with its task in accordance with the mandate received from the Special Commission in June 2004.

2. The members of the WG would like to express their thanks to the Hague Conference on Private International Law and to the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance, for the opportunity they were given to analyse and debate the important issues relating to the law applicable to maintenance obligations and to present this report. They would also like to thank the Permanent Bureau for the support provided during all their activities.

3. The mandate assigned to the WG by the Special Commission in June 2004 was to proceed with its work in order to contemplate the possibility of including in the future convention certain specific rules relating to conflicts of law, and an optional section on the law applicable to maintenance obligations. The WG met twice for that purpose.

4. During the first meeting, held in The Hague on 15 June 2004, the WG developed a first sketch of provisions relating to applicable law, and outlined the elaboration of a Questionnaire relating to the law applicable to maintenance obligations. That Questionnaire was then developed by means of an electronic mailing list, with assistance from the Permanent Bureau of the Hague Conference. It was sent to all Member States of the Hague Conference, States Party to the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*, other States invited to attend the Special Commission meeting in June 2004, and to the relevant governmental and non-governmental international organisations in early September 2004. Since then it has also been available on the Conference's Website at the address < www.hcch.net >, under the heading "Work in Progress". At the time the Report was prepared, 29 jurisdictions had responded to the Questionnaire (see the compilation of responses appended to this Report).[1]

5. The WG met a second time in the Hague on 7 and 8 February 2005. The purpose of that meeting was to analyse the responses to the Questionnaire and to make proposals for the Special Commission meeting to be held in April 2005. The WG was able to agree on a number of proposals which are the object of this Report. With a concern for efficiency, the WG considered it appropriate to enter some of its proposals in a sketch relating to the applicable law, appended hereto (the "Sketch"). The decision to draft proposals for articles is in no way intended to by-pass the discussion at the Special Commission. It is intended only to facilitate that discussion as far as possible, in accordance with the wish expressed by some States that the drafting of an optional section on the applicable law should not take up too much time and energy at the Special Commission.

6. The WG's proposals are divided into three chapters:

I. Abandonment of inclusion of a set of general rules on applicable law in the obligatory part of the Convention;

II. Inclusion of a set of general rules on applicable law in an optional section of the future convention or an *ad hoc* protocol;

III. Inclusion of certain special rules intended to resolve particular problems in the obligatory part of the future convention.

[1] Australia, Austria, Brazil, Canada, China (Hong Kong Special Administrative Region), China (Macao Special Administrative Region), Czech Republic, Estonia, France, Germany, Greece, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Mexico, Morocco, the Netherlands, New Zealand, Poland, Portugal, Romania, Slovak Republic, Switzerland, Ukraine, the United Kingdom and the United States of America. Since then, Iceland, South Africa and Spain have responded to the Questionnaire.

I. Abandonment of inclusion of a set of general rules on applicable law in the obligatory part of the Convention

7. During its proceedings, the WG once again observed the impossibility of reaching an agreement on a set of general rules on applicable law that would be acceptable to a large number of States, and could accordingly be included in the obligatory part of the future Convention. That finding was already fairly clear from Working Document No 13, entitled "Proposal by the Working Group on the Law Applicable to Maintenance Obligations" (hereinafter "Work. Doc. No 13"), distributed to the participants at the Special Commission meeting on 10 June 2004 (see point I, A). This was amply confirmed by the discussion at the Special Commission in June 2004 and by the responses to the Questionnaire. The latter confirmed the existence of a sharp divide between the countries used to applying foreign law with respect to maintenance obligations, and those which always base their decisions on the law of the forum (see responses to Question 1). In addition, most of the countries which rely on application of the law of the forum are unwilling to change their attitude and feel unable to contemplate the application of foreign law (see responses to Question 2). This refusal should be noted, and accordingly the provision of obligatory rules on applicable law in the new Convention should be abandoned.

II. Inclusion of a set of general rules on applicable law in an optional section of the future convention

A. The desirability of including a set of optional rules on applicable law

8. The inclusion of a set of rules on applicable law in an optional section of the future Convention was contemplated by the WG in Working Document No 13. According to that instrument, this approach would have the following advantages:

- The States which are not interested in the application of foreign law in the field of maintenance, nor in a revision of the 1973 Convention, would not be obliged to adhere to the section on applicable law. At the same time, the existence of this section would not prevent them from ratifying the obligatory sections of the convention relating to administrative cooperation and to the recognition and enforcement of foreign decisions;
- The States which are parties to the Hague Convention on the Law applicable to Maintenance Obligations of 2 October 1973 (hereinafter the "1973 Convention") and which are interested in a revision of that instrument, would have the possibility of immediately improving the existing instrument, without having to await an *ad hoc* negotiation on that issue;
- Those States which are not parties to the 1973 Convention, but are interested in the introduction of a certain uniformity in the field of applicable law, could also be interested in this solution.

9. These considerations were supported both by the discussion at the Special Commission in June 2004 and by the responses to Question 3 of the Questionnaire: several States expressed an interest for the introduction into the future instrument of an optional part relating to applicable law (8 responses in support), whereas others were not opposed (2) or stated no position (14). The interested States include countries which are currently parties to the 1973 Hague Convention, but also several States which have not acceded to that instrument. These responses suggest that the introduction of an optional section would allow an extension of the uniformisation of conflict rules to States which have not acceded to the existing instruments.

B. Contents of a possible optional section

1. Preliminary observations

10. In the light of the foregoing considerations and on the basis of the responses to the Questionnaire, the WG discussed the possible contents of an optional section on applicable law.

11. The responses to the Questionnaire facilitated that task insofar as they indicate that an agreement could be achieved fairly easily regarding a certain number of issues of principle:

- the maintenance obligation should be connected on a principal basis to the law of the State of the creditor's residence (responses to question 6);
- when the creditor is unable to obtain maintenance on the basis of that law, he or she should be able to assert another law on a subsidiary basis (responses to question 7);
- in the last resort, he or she should be able to rely on the *lex fori* (responses to questions 8 and 9);
- maintenance claims based on a collateral or affinity relationship should be governed by a special rule, less favourable to the creditor than the ordinary connections (responses to question 15);
- a public body's right to obtain a reimbursement of the benefits provided to the maintenance creditor should be governed by that body's law (responses to question 18).

12. On the other hand, there remain differences as to more specific issues, and in particular:

- retention of a subsidiary connection to the common nationality of the parties (question 7);
- the grant to the creditor of a right to choose between the law of his or her residence and the *lex fori* (question 8);
- the desirability of making maintenance obligations between spouses subject to the law governing the divorce (question 10);
- the desirability of allowing spouses and, if necessary, other parties to designate the law applicable to the maintenance obligation (questions 12 to 14).

13. At its meeting on 7 and 8 February, the WG discussed all these aspects, in drafting the Sketch appended to this Report. In drawing up its proposals, the WG relied mainly on the responses to the Questionnaire. When those responses were not unequivocal, the WG sought, as far as possible, to reconcile two inherently opposite objectives. On the one hand, we sought to draft a text that was not too far removed from the 1973 Convention: that Convention is in force in several States participating in the proceedings for development of the new instrument, and most of those States have stated that they are on the whole satisfied with the experience gained in operating that text. It accordingly appears that an optional section on applicable law is liable to be of interest to them only insofar as its contents do not depart radically from the principles which inspired the 1973 Convention. On the other hand, the provision of an optional section on applicable law can be justified only insofar as it provides solutions partly different from those of the 1973 Convention: some States party to the 1973 Convention criticised certain solutions on which that instrument is based and wish to revise it. In addition, the aims of an optional section include the extension of the unifying work to States which have not ratified the 1973 Convention and are not interested in doing so; in order to interest them, the new instrument would need to remedy certain defects of the 1973 Convention. The following proposals are intended to reconcile those two objectives.

2. Principal connections

14. Pursuant to the 1973 Convention, maintenance obligations are governed in principle by the law of the country of the maintenance creditor's habitual residence (Article 4). According to the WG's report (Work. Doc. No 13, p. 5), this principle ought to be maintained in the new Convention: that criterion has several advantages:

- first, it allows a determination of the existence and amount of the maintenance obligations having regard to the legal and factual situation of the social environment in the country where the creditor lives and engages in most of his or her activities;
- in addition, it secures equal treatment among creditors living in the same country, regardless of their nationality;
- that connection frequently leads to application of the law of the authority seized, which has obvious benefits in terms of simplicity and efficiency.

15. This approach is supported by the responses to the Questionnaire (questions 5 and 6): apart those from States giving preference to the *lex fori*, a broad majority of States favours application of the law of the creditor's habitual residence (20 responses in support), whereas only one State recommended that the primary reference should be made to the national law of the persons concerned. It accordingly appears that a connection to the law of the creditor's habitual residence should be the mainstay of the future instrument's optional section (Article A of the Sketch).

3. Subsidiary connections

16. Pursuant to the 1973 Convention, the connection to the location of the creditor's habitual residence is supplemented by two subsidiary connections. Thus, when the creditor is unable to obtain maintenance on the basis of the law of his or her habitual residence, the law of the parties' common nationality becomes applicable (Article 5); when the creditor is unable to obtain maintenance on the basis of that law, the court in the final resort will apply the *lex fori* (Article 6). This system is obviously inspired by the concern to favour the maintenance creditor to the fullest extent possible.

17. Questioned as to the desirability of including, in the optional section of the future instrument, subsidiary connections for the cases where the creditor is unable to obtain maintenance on the basis of the law of his or her habitual residence, most States answered in the affirmative (20 responses in support). Opinions differ, however, as to the connections to be selected.

a) Subsidiary connection to the common nationality

18. Use of the common nationality of the parties as a subsidiary connection has been criticised, in the field of maintenance, in several respects (see Work. Doc. No 13, p. 6):

- This solution is discriminatory in character as it favours without justification creditors having the same nationality as the debtor: only these creditors are able to rely on alternative application of three different laws, while others must be content with application of the law of their residence or the *lex fori*. This unequal treatment manifests itself notably with regard to maintenance obligations towards children born out of wedlock, of whom a significant number do not have the same nationality as their fathers.
- If the State of the common nationality is the same as that of the habitual residence of the maintenance creditor or debtor, this connecting factor has a certain amount of effectiveness. However, if it is not the same State, the connecting factor leads to the application of a law with which there is normally no really significant connection.
- While the link to the creditor's residence very often leads to the application of the law of the judge seized (indeed, the majority of the Contracting States to the 1973 Convention provide for a forum in the State of the creditor's residence), this is not true for the common nationality. This often results therefore in a dissociation between *forum* and *ius*, between jurisdiction and applicable law, thus obliging the authority

seized to apply a foreign law. Under these circumstances, this connecting factor, which is designed to benefit the creditor, actually causes unnecessary complications harmful to the creditor: the court seized, after having noted that maintenance is not due in accordance with the law of the creditor's habitual residence, will have to verify the content of another foreign law (that of the common nationality), while in many cases, maintenance is due anyway in accordance with the law of the forum.

- Finally, from a more general point of view, the significance attributed to nationality, justifiable in 1973 at a time when this criterion still played a central role in the private international law of a large number of European States, would appear nowadays to be out of date. Today, the role of nationality has diminished in many national systems. As regards international conventions, this change is reflected for instance in the developments which took place in the field of child protection between the 1961 and the 1996 Hague Conventions on the protection of children. Abandonment of the notion of nationality is even more justifiable in the field of maintenance, given the patrimonial element of the allowances themselves.

19. Responses to the Questionnaire (question 7) differ as to the desirability of providing such a connection in the future instrument. A fairly clear-cut majority of States express their opposition to that connection (15 responses), but other States wish to retain common nationality as a subsidiary connection, in the event of the creditor being unable to obtain maintenance on the basis of the law of the State of his or her habitual residence (6 responses in support), or even as a principal connection (1 response in support).

20. The majority of the WG proposes the exclusion of that connection. If that proposal is not acceptable to the Special Commission, the WG proposes the reversal of the order of subsidiary connections provided under the 1973 Convention: the law of common nationality ought to be applicable only if the creditor is unable to obtain maintenance on the basis of either the law of the State of his or her habitual residence, or the law of the forum (Article C of the Sketch). This switch has a material advantage in practice: it relieves the authority seized from the sometimes onerous and difficult task of determining and applying the law of the parties' common nationality, whereas entitlement to maintenance is provided for in any event under the *lex fori*. This simplification is usually reflected in a benefit for the maintenance creditor, as it will allow the production of a faster and equally satisfactory ruling.

b) Subsidiary connection to the *lex fori*

21. The 1973 Convention makes the *lex fori* applicable when the creditor is unable to obtain maintenance on the basis of the law of his or her habitual residence, or of the law of the parties' common nationality (Article 6). In practice, this subsidiary connection usually leads to application of the law of the debtor's domicile or habitual residence.

22. For its part, the Montevideo Inter-American Convention on Support Obligations of 1989 places greater emphasis on the law of the State of the debtor's domicile or habitual residence. That law is applicable instead of that of the creditor's domicile or habitual residence if, according to the authority seized of the application, it is more favourable to the creditor (Article 6). This solution provides more protection for the creditor than that under the 1973 Convention, but it has the drawback of forcing the court to ascertain in every case the contents of two different laws and compare them, before making its determination.

23. In order to find a solution that would provide adequate protection of the creditor's interests without making the task of the competent authority too involved, the WG had contemplated granting the maintenance creditor a right to request application of the law of the authority seized (at least if that law is also the law of the debtor's habitual residence). This solution is more favourable to the creditor than that under Article 6 of the 1973 Convention. At the same time, it also meets the interests of the authorities seized of the application as they may, at the creditor's request, apply the *lex fori*. As for the debtor, he or she could not object to that option, since it most commonly leads to the law applicable in his or her own State of residence.

24. This approach raises several difficulties, however. First, it raises an issue of the creditor's knowledge of the content of the relevant laws, as the option granted to him or her should not lead to a result that is detrimental to him or her in the final analysis. Second, the option raises difficult issues in connection with an application by the debtor for revision of the initial decision: if the creditor has applied for and obtained a decision in the debtor's country on the basis of the *lex fori*, what will happen if the debtor makes an application for modification of that decision in the country of the creditor's residence? Accordingly to generally-applicable rules, the law of the creditor's residence would apply, without any option, which would imply that the decision could be modified because the applicable law is different, without any substantial change in the circumstances. Even though this situation can already occur under the 1973 Convention in those cases where the *lex fori* is applicable on a subsidiary basis, the introduction of an option involves a risk of making it more frequent and more problematic.

25. Having regard to these difficulties, the Questionnaire left an alternative open to the States: according to the first option, the creditor might elect for application of the *lex fori* (question 8); according to the second, it would become applicable automatically when the creditor is unable of obtain maintenance on the basis of the law applicable on a principal basis (question 9).

26. The States' responses are not unequivocal. On the one hand, most of them state their favour for the introduction of an option open to the creditor (12 responses in support to question 8; two States approve this solution provided that there is a significant connection with the country of the authority seized), but several other States objected to this solution (5 responses) or stated substantial reservations (2 States, one of which rejects the idea of the election when children's maintenance is at issue). On the other hand, if the designation right is not accepted, several States have stated their favour for subsidiary application of the *lex fori* when the creditor is unable to obtain maintenance on the basis of the law or laws applicable on a principal basis (6 responses to question 9 in support). This solution is refused by two States only. A majority of States supporting the creditor's designation right did not reply to this question.

27. In the light of these responses and having regard to the difficulties raised by the introduction of a designation right, the WG proposes to give up this solution and to select instead the simpler and more traditional one based on subsidiary application of the *lex fori* when the creditor is unable to obtain maintenance on the basis of the law applicable on a principal basis. Another advantage of this solution is that it is closer to that under the 1973 Convention, which would make it more attractive to those States which are at present parties to the latter (see *supra*, point II, A, 1). Unlike the solution under the 1973 Convention, however, the *lex fori* would become immediately applicable if the creditor is unable to obtain maintenance on the basis of the law of his or her habitual residence, without requiring a transit through the intermediary stage of the parties' common nationality (Article B of the Sketch).

4. Special rules on applicable law

28. After the general rules, the 1973 Hague Convention contains a certain number of special rules governing particular situations, maintenance obligations between collaterals or based on affinity (Article 7) and between divorced or separated spouses (Article 8), as well as the law applicable to public bodies seeking reimbursement of benefits paid in favour of the maintenance creditor (Article 9). The WG has discussed whether these rules should be maintained in the framework of the future instrument's optional section.

a) Maintenance obligations between divorced spouses

29. The 1973 Convention contains a special rule for maintenance obligations between divorced spouses, which by virtue of Article 8 are exclusively governed by the law applied to the divorce. This solution applies not only when the application for maintenance is decided in the framework of the divorce proceedings (or at the time of divorce), but also in the case of any subsequent revision or modification of decisions concerning maintenance obligations between divorced spouses, in particular in the event of an action

complementary to a divorce judgment rendered abroad. It is also applicable to legal separation and to marriages declared void or annulled.

30. This special rule certainly has some advantages (application of a single law to the divorce and maintenance; observance of the agreements made by the spouses at the time of divorce), but it also presents various shortcomings, to such an extent that certain States party to the 1973 Convention wish to have it removed:

- As the alternative connecting factors of Articles 4 to 6 are set aside, the interests of the creditor are not fully protected. In particular, if the law of the divorce does not provide for maintenance, there is no possibility of discounting it in favour of another law, except by means of the public policy clause. In addition, the factual and legal conditions of the social environment in which there is a real need for maintenance are not taken into account, which is in contradiction to the general spirit of the Convention;
- The law applicable to the maintenance obligation at the time of divorce may differ from that governing it during the marriage, which may lead to unexpected changes for the spouses concerned;
- The law applicable to the maintenance claims of a divorced spouse may differ from those governing the children's claim, even if they live with him or her;
- As the conflict rules with regard to divorce are not unified at the international level, the effect of Article 8 is to compromise any unification with regard to the law applicable to maintenance obligations. This latter law must depend on the private international law of the State of the divorce proceedings, and this solution inevitably favours forum shopping;
- The choice of a connecting factor that does not vary with time can lead, when the maintenance obligation between divorced spouses is to be settled after the divorce, to application of a law which has lost all relevance with regard to the situation of the ex-spouses and their respective interests. The judge will not be able to take into account the law of either the current residence of the creditor or that of the debtor;
- It is possible that the divorce judgment contains no decision as regards maintenance. In this case, the concern for continuity on which Article 8 is based would appear to be unfounded. This is particularly true if the spouses have divorced in a country which does not provide for maintenance of a divorced spouse. Here, application of the law of the divorce leads to refusal of any maintenance, except if its application is discounted by public policy;
- Finally, there may be practical difficulties in that sometimes it is difficult to detect in the judgment the law by virtue of which the divorce was pronounced.

31. For these reasons, the WG had come to the conclusion that a revision of the present solution was desirable (Work. Doc. No 13, p. 8). The responses to the Questionnaire differ as to the desirability of providing for a special connection in divorce matters.

32. A majority of States prefer to rule out the solution provided for by Article 8 of the 1973 Convention (14 responses in support), but certain States support a rule with this content (5 responses in support). Two States recommend an intermediary solution, whereby the law governing the divorce ought to apply only if the maintenance obligation is determined in the course of the divorce proceedings, whereas the ordinary connections would prevail when the maintenance obligation is determined subsequently.

33. In the light of these responses, the WG proposes to rule out the special connection to the law governing the divorce. At the same time, it suggests granting the spouses the right to designate, in the course of divorce proceedings, the law applicable to the maintenance obligation, choosing between the *lex fori* and the law applicable to the divorce or matrimonial property regime according to the private international law of the authority seized (Article D of the Sketch).

34. This solution - which had been contemplated by the WG in Working Document No 13, p. 8, and suggested by certain States' responses to questions 12 and 13 of the

Questionnaire (see *infra*, point c) - has several advantages. It can lead to the application of

a single law to both the maintenance obligation and the divorce and/or dissolution of the matrimonial property regime. However, this unification occurs only if it corresponds to the spouses' wish, which avoids to a large extent the drawbacks connected with Article 8 of the 1973 Convention. At the same time, the designation of law by the spouses occurs at a time when they are aware of (or can obtain information regarding) the advantages and risks involved in such a choice. In order to make sure that the spouses are aware of their choice and to avoid the complications connected with the determination of an implied intent, the WG considers, however, that the designation of law ought to be express.

35. Several points remain to be defined, however. First, it will be necessary to clarify at what time the election may be exercised: according to the WG's intention, this should be a choice connected with proceedings for divorce (or for legal separation or for avoidance or annulment of marriage), but it will be necessary to specify whether the choice should be stated before the authority seized, and until what time it will remain available. It remains also to be defined whether that option is also available when the maintenance obligation is the object of proceedings separate from those for divorce, as is the case in certain countries. Finally, it will be necessary to determine whether the result of this election will be to "crystallise" the applicable law, to wit, whether it will continue to be effective in any proceedings for revision of the maintenance instituted subsequently before the authorities of the same or another State. According to the WG, such a crystallisation - even if it were to be accepted - does not incur the objections currently raised against Article 8 of the 1973 Convention, as it would in any event rely on the parties' intent. If the Special Commission considers that the spouses' choice is to be accepted, all these issues will need to be analysed in further detail.

b) Designation of law by the spouses before the divorce

36. The WG also discussed the possibility of granting the spouses a right to designate the applicable law outside proceedings for divorce or for legal separation or avoidance or annulment of marriage. The parties' autonomy would be particularly useful to secure the effectiveness of an agreement made by the spouses (before or after the marriage) with a view to settling their maintenance obligations and / or matrimonial property regime.

37. The replies to the Questionnaire have demonstrated, however, reluctance by several States to allow party autonomy in this area. Some States did state a preference for this solution (13 responses to question 12 in support). One of these States, however, wished to restrict this option to divorce proceedings initiated or to be initiated (in accordance with Article 4 of the Sketch, see *supra*, point II.3.a). Other States demand creation of a mechanism to protect the weaker party, based for instance on the obligation to obtain independent legal advice before making the choice of law. Finally, several States simply object to the admission of party autonomy in this area (9 responses).

38. A majority of States oppose the admission of election of the law applicable to maintenance obligations to children (16 responses against, only 2 affirmative responses to question 13). Certain States suggest that this option be considered while demanding, however, the implementation of mechanisms to protect the child against a choice detrimental to him or her (3 responses in support).

39. Finally, most of the States consider that while the right to choose the applicable law ought to be accepted, that election should be limited to certain options. Certain States are willing to accept only the choice of the *lex fori*, which implies that they contemplate only an election made at the time of the claim or suit (in accordance with Article D of the Sketch, see *supra*, point II.3.a). Other States suggest allowing the choice of all the laws with which there is a significant link, or wish to restrict the choice to the following options: the law of the debtor's or parties' residence, the law of their last common residence, the parties' national laws or the law governing the matrimonial property regime.

40. In the light of these responses and the issues raised by party autonomy in this area, the WG considers it premature to make proposals aimed at including this election in the optional part of the future Convention, but it is willing to consider this matter in further detail if the Special Commission considers it to be appropriate.

c) Maintenance obligations between persons related collaterally or by affinity

41. A special rule is presently included in Article 7 of the 1973 Convention on maintenance obligations between persons related collaterally or by affinity. This rule enables the debtor to oppose an application based on the general rules on applicable law on the ground that no maintenance obligation exists under the law of the common nationality of debtor and creditor or, in the absence of common nationality, under the internal law of the debtor's habitual residence.

42. The WG has suggested the introduction of a special rule for maintenance obligations between persons related collaterally or by affinity, on the grounds that the principle of *favor creditoris*, which inspires the general rules on applicable law, cannot be directly transposed to such particular situations. It nevertheless suggested certain modifications (restriction of the scope of the special rule to those situations where the creditor is an adult; removal of the reference to the law of the parties' common nationality; see Work. Doc. No 13, p. 9).

43. The responses to the Questionnaire show that most of the States favour the provision of a special rule for maintenance obligations between persons related collaterally or by affinity (15 responses in support, 5 against). A majority of States also favour excluding the reference to the law of common nationality as provided for under Article 7 of the 1973 Convention (11 responses in support, 6 against). On the other hand, the WG's proposal to restrict the special rule relating to maintenance obligations between persons related collaterally or by affinity to those situations where the creditor is an adult has met with only limited approval from the States (11 responses against, 6 in favour).

44. Having regard to these responses, the WG proposes a special rule for obligations between persons related collaterally or by affinity, whereby the debtor may assert against the creditor's claim the absence of any obligation to him or her under the law of the debtor's habitual residence (Article E of the Sketch).

d) Public bodies

45. In the WG's view, a special rule corresponding to Article 9 of the 1973 Convention relating to the law applicable to public bodies ought to be included in the future instrument. Under that rule, the right of public bodies to seek reimbursement of benefits provided to the creditor shall be governed by the law applicable to those bodies. Almost all the States have expressed their favour for the provision of this rule (22 responses in favour, 1 against).

46. Accordingly, the WG proposes to include this rule in the optional section of the future Convention. With a view to clarity, however, it proposes that it be specified that this rule shall apply only to the reimbursement of benefits paid "by way of maintenance" (Article F of the Sketch).

5. Scope of the applicable law

a) Definition of the field of applicable law

47. The WG proposes including in the new instrument a rule designed to define the scope of the law applicable to the maintenance obligation (Work. Doc. No 13, p. 10). That rule could be based on Article 10 of the 1973 Convention (Article G(1) of the Sketch).

48. The only modification which had been envisaged concerns the wording of Article 10(2) of the 1973 Convention, according to which the law applicable to the maintenance obligation determines in particular "who is entitled to institute maintenance proceedings". According to the WG, the formulation of this rule gives rise to a some amount of uncertainty: several different issues should be distinguished:

– Who is the creditor, *i.e.* who is entitled to maintenance? This is certainly a matter to be governed by the law applicable to the maintenance obligation, but this is already provided by Article 10(1) of the 1973 Convention (and by Article G lit. a. of the Sketch);

– If the creditor is a child, who is representing him or her? It seems that this issue is outside the scope of the law applicable to maintenance and should not be dealt with

in the future convention; it depends on parental responsibility in respect of the child which is to be determined by other, autonomous conflict rules (the 1961 or the 1996 Hague Convention on the protection of children contain such rules for the States which are parties to these instruments);

– Who has *locus standi* in the procedure? This seems to be an issue to be determined according to the law of the authority seized;

– Is a public body entitled to enforce a right of the creditor on his or her account (apart from the situation of reimbursement of benefits paid, governed by Article F)? It seems that certain domestic laws grant public bodies the power to bring action in the stead of a maintenance creditor child; under the terms of Article 10(2) of the 1973 Convention, this power ought to be recognised even abroad if provided for by the law governing the maintenance obligation.

49. In order to avoid the risk of confusion among these (and possibly other) issues, the WG had proposed a change in the wording currently used in the 1973 Convention. The responses to the Questionnaire seem to indicate, however, that the States do not feel this need, as a majority have stated that they favour retaining this rule (17 responses in support, 4 against). In order to clarify the provision, certain States suggest an indication that the right to institute proceedings does not include issues of procedural capacity or representation.

50. The WG accordingly proposes a specification that the law applicable to the maintenance obligation shall determine in particular who may institute proceedings for maintenance, subject to the issues relating to procedural capacity and representation in the proceedings (Article G, lit. b of the Sketch).

b) Law applicable to agreements relating to maintenance obligations

51. The WG considered the issue of the law applicable to agreements relating to maintenance obligations, though without reviewing it in detail. These agreements are frequently made by spouses before or during the marriage. While this issue is closely connected to that of the acceptance of party autonomy (see point II.B.4.c), it arises even in the absence of a choice by the parties. In the current standing, it is not certain that these agreements are within the scope of the 1973 Convention.

52. The WG considers it premature to submit proposals to the Special Commission, but it is willing to consider this matter in further depth if the Special Commission considers it to be appropriate.

6. Substantive rules and public policy

53. a) According to Article 11(2) of the 1973 Convention, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance, even if the applicable law provides otherwise.

54. The question of whether to maintain such a substantive rule was hotly debated in the WG. In this respect, it should be observed, on the one hand, that the meaning of the rule is not very clear: is it to be regarded as a device for discounting the applicable foreign law when it does not provide for the consideration of the needs of the creditor and the resources of the debtor? Does it come into play also when the maintenance obligation is governed by the domestic law of the forum (*e.g.* when the application is filed in the State of the creditor's habitual residence)? At the same time, doubts were raised regarding the practical utility of the provision.

55. The responses to the Questionnaire show that a majority of States favour provision of a substantive rule with this content (15 responses in support). Certain States, however, support removing this rule or wording it more narrowly (7 responses).

56. After discussion of the matter in depth, the WG drafted two alternative proposals. Under the first, a rule corresponding to the current text of Article 11(2) of the 1973 Convention should be included in the optional part of the future instrument. However, with a concern for clarification, this rule should be separated from the public policy exception, in

order to show that this is a mechanism allowing adaptation of the applicable law (domestic or foreign), and not its exclusion. For this purpose, the rule is included in Article G relating to applicable law (Article G(2), option 1).

57. The alternative proposal (Article G(2), option 2) is distinguished from the former in several respects: first, the rule is no longer imperative ("*shall* be taken into account") but optional ("The Authorities seized *may* take into account"). Thus it is a mere "*Kannvorschrift*", less imperative for the States. Second, it is provided that the reference to the needs of the creditor and resources of the debtor can be replaced by the following phrase: "costs of living in the different States involved"; this seems better suited to the rule's practical purpose. This provision is also included in Article G to stress that this is not a manifestation of public policy but a mechanism allowing adaptation of the applicable law (which is also inferred from the phrase "to determine the amount of the maintenance *under the applicable law*").

58. b) The WG also considered the desirability of including another rule of substantive private international law, whereby the economic settlements between the parties should be taken into account in determining the amount of maintenance between adults, even if the applicable law provides otherwise (Work. Doc. No 13, p. 10). This suggestion is inspired by a resolution of the Institute of International Law (Session of Helsinki, 1985), which recommends taking into consideration the patrimonial settlements actually effected by the spouses at the time of dissolution of marriage. This proposal raises some difficulties as the term "economic settlements" is not clear. The States' responses to this proposal (question 22 of the Questionnaire) were very mixed: nine States approved it, ten were hostile. Accordingly, the WG will not emphasise this proposal but leaves the matter to the decision of the Special Commission (Article G(3) of the Sketch).

59. c) Finally, no objection was raised within the WG as to the desirability of including in the text of the future instrument a clause allowing the foreign law applicable under the convention to be excluded when it is manifestly inconsistent with the public policy of the forum State (Article H of the Sketch).

C. Relationship between a possible optional section and the 1956 and 1973 Conventions on applicable law

60. If the principle of an optional section is approved, it will be necessary to settle the issue of the relationship between that new text and the 1956 and 1973 Conventions on applicable law. This issue has not been reviewed in depth to date within the WG.

III. Introduction of certain special rules aiming at resolving particular issues in the obligatory part of the future Convention

61. In accordance with the mandate received from the Special Commission, the WG also discussed the possibility of including, in the obligatory part of the future instrument, certain special rules on applicable law designed to resolve specific issues. The usefulness of this approach seems to be confirmed by the responses provided to the Questionnaire by certain States which, while not interested in a general regulation of the issues of applicable law, nevertheless displayed some interest for *ad hoc* conflict rules (see in particular the responses to questions 2, 3 and 6 of the Questionnaire). The proposal put forward by the WG in this regard are still at an embryonic stage; if the Special Commission wishes to retain them the WG would certainly have to undertake a more in depth study.

A. *Ad hoc* rule relating to the eligibility of the maintenance creditor

62. In Working Document No 13 (point I.B.1), the WG had found that the difference in approach between States which apply, in principle, the law of the creditor's habitual residence and those which always rely on the forum law is liable to produce, in certain specific cases, unfair results.

63. That is true in particular when a decision issued in the State of the creditor's residence cannot be recognised in the State of the debtor's residence for reasons connected with the lack of indirect jurisdiction. In that case, the maintenance creditor is compelled to bring his or her claim in a country other than that of his or her own residence. This solution is acceptable if the *lex fori* (*i.e.*, that of the debtor's residence) grants the creditor a standard of protection equivalent to (or higher than) that to which he or she would have been entitled on the basis of the law of his or her own residence. On the other hand, application of the *lex fori* leads to unfair results if it is less favourable for the creditor, and in particular if it considers the creditor to be ineligible for a maintenance benefit, for instance by reason of age. In such case, the creditor is unable to institute proceedings in the debtor's country, as that country's law grants him or her no benefit at all.

64. On the basis of these findings, the WG had sought to find a few concrete solutions (Work. Doc. No 13, p. 4). In particular, a specific rule had been contemplated enabling the creditor to assert the law of the country of his or her habitual residence; this rule would have been combined with a mechanism facilitating the proof of foreign law, *e.g.*, by means of a certificate issued by the authorities of the State of his or her habitual residence. This suggestion was included in the responses provided to the Questionnaire by certain States (see in particular responses to questions 2 and 6).

65. The ensuing discussion at the Special Commission allowed certain aspects to be clarified. It appeared, first, that the issue will arise mainly when the State of the debtor's residence makes use of the reservation as to Article 15(1) *c)* of the Sketch Convention prepared by the Drafting Committee at the meeting on 19-22 October 2004 (Prel. Doc. No 13), to wit, when that State refuses to recognise a decision issued in the State of the creditor's habitual residence: in other cases, the creditor will be able to obtain a favourable decision in the State of his or her own residence and have it enforced in the debtor's State. The prohibition of revision on the merits (Article 22 of the Sketch Convention) shelters him or her from possible grievances based on the domestic law of the requested State.

66. Second, the discussion showed that the approach based on a certificate issued by the Authorities of the State of the creditor's residence, as contemplated in Working Document No 13, raised many difficulties connected with the determination of the authority competent to issue it, and to determination of the said certificate's contents and its effects in the State of the debtor's residence.

67. In the light of these considerations, it appeared preferable to restrict application of the special rule to those cases where the creditor has obtained, in the State of his or her residence, a decision granting him or her a maintenance benefit but which cannot be recognised in the State of the debtor's residence owing to the reservation relating to Article 15(1) *c)* of the Sketch Convention. In those situations, the State of the debtor's residence, seized of a new application by the creditor, cannot deny him or her entitlement to a benefit on the grounds that he or she is not eligible on the basis of the *lex fori* (Article 10 *bis* of the appended Sketch).

B. *Ad hoc* rules on the law applicable to certain issues at the stage of enforcement of a foreign decision

68. In Working Document No 13, the WG had contemplated the inclusion, in the obligatory part of the future Convention, of an *ad hoc* rule on the law applicable to limitation at the time of enforcement of a foreign decision. Other special rules were suggested by certain States in their responses to the Questionnaire (see in particular responses to question 3).

69. The discussion within the WG confirms the usefulness of such rules as an exception from the principle laid down by Article 28 of the Sketch Convention prepared by the Drafting Committee (Work. Doc. No 13), whereby enforcement measures shall be governed by the law of the requested State.

a) Duration of the maintenance benefit based on the decision to be enforced

70. A first exception from that principle is justified as regards the duration of the maintenance benefit arising out of the decision. That duration is sometimes expressly

provided for by the decision itself (it may specify, for instance, that a periodic benefit is to be paid until such time as the creditor reaches a certain age). In that case, there is no problem, as the decision will be enforced in the requested State in accordance with its provisions. It may happen, however, that the decision contains no indication as to the duration of the benefit. In that case, application of the rules in force in the requested State, provided for under Article 28 of the Sketch Convention, can lead to discontinuation of the decision's enforcement at a time other than as provided for under the law of the State of origin (or the law applicable according to that State's conflict rules). In order to avoid this, the WG proposes including a provision whereby "effect shall be given to any rules applicable in the State of origin relating to the duration of the maintenance obligation" in the requested State (Article 28(2) of the Sketch).

b) Limitation period for arrears

71. A second exception was contemplated for determination of the period during which arrears payable on the basis of a foreign decision may be enforced. Since the issue is determination of a limitation period for the rights arising out of the decision to be enforced, the period to be used ought strictly speaking to be that of the State of that decision's origin. Having regard to the difficulties and delays connected with enforcement abroad, however, it appeared that a solution more favourable to the creditor could be justified. Accordingly, the WG proposes that the limitation period for arrears should be the period provided by the law of the requested State or the period provided by the law of the State of the decision's origin, whichever is longer (Article 28(3) of the Sketch).

A N N E X 1 – WORKING DRAFT ON APPLICABLE LAW

Working Draft on Applicable Law

Article A

The internal law of the State of the habitual residence of the creditor[1] shall govern the maintenance obligations arising from a family relationship, parentage, marriage or affinity[, including a maintenance obligation in respect of a child regardless of the marital status of the parents].

In the case of a change in the habitual residence of the creditor, the internal law of the State of the new habitual residence shall apply as from the moment when the change occurs.

Article B

If the creditor is unable, by virtue of the law referred to in Article A, to obtain maintenance from the debtor, the internal law of the State of the authority seized shall apply.

[*Article C*

If the creditor in unable, by virtue of the laws referred to in Articles A and B, to obtain maintenance from the debtor the law of their common nationality shall apply.]

[*Article D*

Notwithstanding the provisions of Articles A to C, the law applicable to a maintenance obligation between spouses or former spouses may be the object of an express choice of law in favour of the internal law of the authority seized, or of the law applicable to the divorce or to the matrimonial property regime according to the rules of conflict of laws of the authority seized.

The foregoing paragraph shall apply also in the case of a legal separation, and in the case of a marriage that has been declared void or annulled.]

Article E

In the case of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest a request from the creditor on the ground that there is no such obligation under the internal law of the State of the debtor's habitual residence.

Article F

The right of a public body to obtain reimbursement of a benefit provided to the creditor in lieu of maintenance shall be governed by the law to which the body is subject.

Article G

1. The law applicable to the maintenance obligation shall determine *inter alia* –

a) whether, to what extent and from whom the creditor may claim maintenance;

b) who is entitled to institute maintenance proceedings, except for issues relating to procedural capacity and representation at the proceedings;

[1] See the definition of 'creditor' under Article 3 *b)* of the Working Draft of a Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

c) the time limits for the institution of proceedings;

d) the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor in lieu of maintenance.

Option 1

2. However, even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance.

Option 2

2. The authority seized may, in determining the amount of maintenance under the applicable law, take into account [the needs of the creditor and the resources of the debtor] [the costs of living in the different States involved].

[3. Even if the applicable law provides otherwise, for the purposes of determination of the amount of maintenance between spouses, the economic settlements between them shall be taken into account.]

Article H

The application of the law designated by the Convention's conflict rules may be refused only if it is manifestly incompatible with the public policy of the State of the authority seized.

Proposals for conflict rules to be included in the mandatory part of the future Convention

Article 10 bis

Where a maintenance decision made in the State of the habitual residence of the creditor cannot be recognized in the requested State by virtue only of a reservation made in respect of Article 15(1) *c)*, the creditor shall be regarded as entitled to maintenance in a proceeding to establish a decision in the requested State in accordance with Article 10(1) [*d)*] even if the applicable law of that State provides otherwise.

Article 28, new paragraphs 2 and 3

2. However, effect shall be given to any rules applicable in the State of origin relating to the duration of the maintenance obligation.

3. Any limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the requested State, whichever provides for the longer limitation period.

A N N E X 2 – RESPONSES TO THE QUESTIONNAIRE RELATING TO THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

RESPONSES TO THE QUESTIONNAIRE RELATING TO THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS
RÉPONSES AU QUESTIONNAIRE RELATIF À LA LOI APPLICABLE AUX OBLIGATIONS ALIMENTAIRES

1. Application of foreign law with respect to maintenance obligations – Application du droit étranger en matière d'obligations alimentaires

Question 1	
According to the private international law system of your country, can the establishment of a maintenance decision be based, in certain cases, on the application of foreign law? **Please answer YES or NO.**	Selon le système de droit international privé de votre pays, l'établissement d'une décision en matière alimentaire peut-il se fonder, dans certains cas, sur l'application d'une loi étrangère ? Merci de bien vouloir répondre par OUI ou NON.

Australia – Australie : No.

Austria – Autriche : Yes.

Brazil– Brésil :

Yes. The applicability of foreign law results from the national conflict rules, which uses the domicile as the main connecting factor. However, most of the time Brazilian law will be applicable, due to special regulations that will be followed by the judges.

Canada :

Loi sur le divorce fédérale
Non.
Province de droit civil du Québec et Provinces et territoires de Common Law
Oui*.

Federal *Divorce Act*
No.
Common Law provinces and territories and Civil Law Province of Quebec
Yes*.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) :

No. At the moment, the making of a maintenance decision by a court in Hong Kong cannot be based on foreign law. In other words, foreign law cannot be the governing/applicable law in maintenance cases (except reciprocal recognition and enforcement under the Maintenance Orders (Reciprocal Enforcement) Ordinance (Chapter 188 of the Laws of Hong Kong) which applies to certain maintenance decisions made in a jurisdiction designated in that Ordinance).

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : Yes.

Czech Republic – République tchèque :

Yes. The applicability of foreign law results from the national conflict rules as well as number of bilateral treaties.

Estonia – Estonie : Yes.

France : Oui.

Germany – Allemagne : Yes.

Greece – Grèce : Oui.

Iceland – Islande : No.

Ireland – Irlande :

No. Domestic law in relation to maintenance is governed by a series of statutes none of which make provision for the application of law other than that of the forum. In the absence of any binding rule to the contrary, Irish Courts will always apply Irish law.

Italy – Italie : Oui.

Japan – Japon : Yes.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : Yes.

Luxembourg : Oui.

Mexico – Mexique : No.

Morocco – Maroc :

Oui, s'il y a une convention ou une règle de rattachement qui fait référence à la loi étrangère.

Netherlands – Pays-Bas : Oui.

New Zealand – Nouvelle-Zélande :

Yes. New Zealand establishes maintenance decisions under both the Commonwealth and UNCRAM regimes. New Zealand also has a reciprocal agreement with Australia.

Commonwealth regime

Under the Commonwealth regime, New Zealand courts apply the law of the maintenance creditor. The maintenance creditor obtains a provisional order in their own jurisdiction. That provisional order is transmitted to New Zealand and an application is made to the New Zealand courts to confirm it. At this stage the debtor has an opportunity to mount a defence. The New Zealand court considers that defence in accordance with the law of the maintenance creditor.

UNCRAM regime

Under the UNCRAM regime, the creditor has to bring proceedings in New Zealand. New Zealand courts then apply New Zealand law.

Reciprocal agreement with Australia

The New Zealand and Australian Governments have entered into a reciprocal agreement to facilitate recognition and enforcement of maintenance decisions. The agreement applies to

administrative (formula) based child support, voluntary arrangements and court awarded child and spousal maintenance.

Under the Agreement, the country in which the payee lives has jurisdiction to issue assessments and make court orders. When the payer lives in the other country, debt and assessment details may be referred to that country for collection. The collecting country will, in effect, be an agent and will use the child support collection and enforcement laws of its country to collect payments.

The spirit of the agreement is mutual cooperation between the two child support authorities.

Poland – Pologne : Yes.

Portugal : Yes.

Romania – Roumanie :

Oui.

- **Loi no. 105/1992 les rapports de droit international privé**, Chapitre II, Section IV, art. 34-35
- **Loi no. 187/2003 sur la juridiction, reconnaissance et exécution en Roumanie des décisions en matière civile et commerciale rendues dans les États membres de l'Union Européenne,** art. 4, al. 1, lit. b
- Conventions et traités bilatéraux sur l'entraide judiciaire en matière civile :
  - Traité entre la Roumanie et l'**Albanie** sur l'entraide judiciaire en matière civile, familiale et pénale, ratifié par le Décret no. 463/1960, art. 26
  - Convention entre la Roumanie et la **Belgique** sur la reconnaissance des décisions sur les pensions alimentaires, ratifiée par le Décret no. 316/1980
  - Convention entre la Roumanie et la **Belgique** sur la reconnaissance des décisions en matière du divorce, ratifiée par le Décret no. 53/1982
  - Par la Note verbale no. 943 du 8.02.1995 du Ministère des Affaires Etrangères Bosniaques, **Bosnie et Herzégovine** a notifié la succession du Traité entre la Roumanie et l'ex-Yougoslavie sur l'entraide judiciaire en matière civile, familiale et pénale, ratifié par le Décret no. 24/1961 - art. 26
  - Traité entre la Roumanie et la **Bulgarie** sur l'entraide judiciaire en matière civile, familiale et pénale, ratifié par le Décret no. 109/1959, art. 26
  - Loi no. 44/1995 pour la ratification du Traité entre la Roumanie et la **République tchèque** sur l'entraide judiciaire en matière civile - art. 31
  - Accord entre la Roumanie et la République de la **Corée du Nord** sur l'entraide judiciaire en matière civile, familiale et pénale, ratifié par le Décret no. 305/1972 - art. 25
  - Par le Protocole intergouvernemental roumain–croate sur la succession des accords conclus par la Roumanie avec l'ex-Yougoslavie, approuvé par H.G. no. 951/2004, **Croatie** est successeur du Traité entre la Roumanie et l'ex-Yougoslavie sur l'entraide judiciaire en matière civile, familiale et pénale, ratifié par le Décret no. 24/1961 - art. 26
  - Traité entre la Roumanie et la **Mongolie** sur l'entraide en matière civile, familiale et pénale, ratifié par le Décret no. 415/1973 - art. 27
  - Loi no. 33/2000 sur l'approbation de l'O.G. no. 65/1999 sur la ratification du Traité entre la Roumanie et la **Pologne** sur l'entraide en matière civile - art. 33-34
  - Traité entre la Roumanie et la **République de la Moldavie** sur l'entraide judiciaire en matière civile, familiale et pénale, ratifié par la Loi no. 177/1997 - art. 30
  - Traité entre la Roumanie et la **Fédération de Russie** sur l'entraide judiciaire en matière civile, familiale et pénale, ratifié par le Décret no.334/1958, art. 26-29

- Traité entre la Roumanie et la **Serbie et** le **Monténégro** (l'ex-Yougoslavie) sur l'entraide en matière civile, familiale et pénale, ratifié par le Décret no. 24/1961 - art. 26-27
- Loi no. 30/2000 sur le protocole entre les Gouvernements roumain et slovaque sur la validité des traités, accords, conventions et autres conventions conclus avec la République tchécoslovaque - art. 26-28
- Par le Protocole entre les Gouvernements de la Roumanie et de la Slovénie sur l'inventaire du cadre juridique bilatéral, approuvée par le H.G. no. 951/2004, **Slovénie** est successeur du Traité entre la Roumanie et l'ex-Yougoslavie sur l'entraide judiciaire en matière civile, familiale et pénale, ratifié par le Décret no. 24/1961 - art. 26 -27
- Convention entre la Roumanie et l'**Espagne** sur la juridiction, la reconnaissance et l'exécution en matière civile et commerciale, ratifié par la Loi no. 3/1999 - art. 5
- Traité entre la Roumanie et la Hongrie sur l'entraide judiciaire en matière civile, familiale et pénale, ratifié par le Décret no. 505/1958 - art. 26-28

Yes.

- **Law no. 105/1992 on the private international law relations**, Chapter II, Section IV, art. 34-35
- **Law no. 187/2003 on the jurisdiction, recognition and enforcement in Romania of the decisions in civil and commercial matters rendered in the member states of the European Union, a**rt. 4, al. 1, lit. b
- Bilateral conventions and treaties in judicial assistance in civil matters
  - Treaty between Romania and **Albania** on judicial assistance in civil, family and criminal matters, ratified by Decree no. 463/1960, art. 26
  - Convention between Romania and **Belgium** on recognition of the decisions on the alimony, ratified by the Decree no. 316/1980
  - Convention between Romania and **Belgium** on the recognition and of the divorce decisions, ratified by the Decree no. 53/1982
  - By the verbal note no. 943 from 8.02.1995 of the Foreign Affairs Ministry of Bosnia and Herzegovina, **Bosnia and Herzegovina** has notified the succession to the Treaty between Romania and ex-Yugoslavia on the judicial assistance, ratified by Decree no. 24/1961 - art. 26
  - Treaty between Romania and **Bulgaria** on the judicial assistance in civil, family and criminal law, ratified by the Decree no. 109/1959, art. 26
  - Law no. 44/1995 for the ratification of the Treaty between Romania and **Czech Republic** on the judicial assistance in civil matters- art. 31
  - Agreement between Romania and **North Korea** on the judicial assistance in civil, family and criminal matters, ratified by the Decree no. 305/1972 - art. 25
  - By the intergovernmental Romanian–Croat Protocol on the succession to the agreements concluded by Romania with ex-Yugoslavia, approved by H.G. no. 951 from 15 June 2004, **Croatia** is successor to the Treaty between Romania and ex-Yugoslavia on the judicial assistance, ratified by Decree no. 24/1961 - art. 26
  - Treaty between Romania and **Mongolia** on the judicial assistance in civil, family and criminal matters, ratified by the Decree no. 415/1973 - art. 27
  - Law no. 33/2000 on the approval of the O.G. no. 65/1999 on the ratification of the Treaty between Romania and **Poland** on judicial assistance in civil matters- art. 33-34
  - Treaty between Romania and **Republic of Moldova** on judicial assistance in civil and criminal law, ratified by the Law no. 177/1997 - art. 30
  - Treaty between Romania and **Russian Federation** on the judicial assistance in civil, family and criminal matters, ratified by Decree no.334/1958, art. 26-29
  - Treaty between Romania and **Serbia and Montenegro** (ex-Yugoslavia) on the judicial assistance, ratified by the Decree no. 24/1961 - art. 26-27
  - Law no. 30/2000 on the Protocol between Romanian and **Slovakian** Governments on the validity of the treaties, agreements, conventions and

others conventions concluded by Romania with Republic of Czechoslovakia - art. 26-28

- By the Protocol between Romanian and Slovenian Governments on the list of the bilateral judicial framework, approved by the Romanian Government by the H.G. no. 951/2004, **Slovenia** is successor to the Treaty between Romania and ex-Yugoslavia on the judicial assistance, ratified by Decree no. 24/1961 - art. 26 -27
- Convention between Romania and **Spain** on the jurisdiction, recognition and enforcement in civil and commercial matters, ratified by the Law no. 3/1999 - art. 5
- Treaty between Romania and **Hungary** on the judicial assistance in civil, family and criminal matters, ratified by the Decree no. 505/1958 - art. 26-28

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Oui.

Switzerland – Suisse : Yes.

Ukraine : No.

United Kingdom – Royaume-Uni : No.

United States of America – Etats-Unis d'Amérique :

No. The Uniform Interstate Family Support Act, which is in effect in all fifty American states, requires that the tribunal apply forum law to determine who is entitled to support and the quantum of support.

Question 2	
If you answered NO to question 1, please specify whether, from your country's point of view, it could be contemplated that entitlement to maintenance and/or its amount might be governed, in certain cases, by the law of a foreign country. **Please answer YES or NO.**	**Si vous avez répondu par NON à la première question, veuillez préciser si, du point de vue de votre pays, il est envisageable que le droit à une prestation alimentaire et/ou son montant soient régis, dans certaines circonstances, par la loi d'un pays étranger.** **Merci de bien vouloir répondre par OUI ou NON.**

Australia – Australie : No.

Austria – Autriche : N/A.

Brazil - Brésil : N/A.

Canada : N/A.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) :

No. We do not perceive that there is any unfairness or injustice for Hong Kong law to be applied in deciding upon financial provisions consequential upon the parties' divorce. If one of the parties wishes the law of his/her domicile to govern his/her divorce or financial relief,

it is always open to him/her to resort to the courts of his/her domicile for the purpose of divorce proceedings.

Moreover, in the area of family law and maintenance obligations, the question of choice of law is inextricably linked with that of jurisdiction. The court's power (jurisdiction) to make a particular type of order is linked with the substantive considerations as to whether one type of order should be preferred over another. By way of further example, section 14 of the Matrimonial Proceedings and Property Ordinance (Chapter 192 of the Laws of Hong Kong) renders void any provision in a maintenance agreement which ousts the jurisdiction of the court can be regarded as both jurisdictional and substantive in nature. If we are to have a system whereby (i) Hong Kong courts are to have jurisdiction to make orders for financial provision but (ii) in exercising such jurisdiction Hong Kong courts are allowed to apply foreign law in making such orders (or make orders which previously could only have been made by foreign courts) there will have to be a major overhaul of our legislation governing financial relief. We are not convinced of any need for such an overhaul.

Furthermore, in applying foreign law, the aim is to try to administer that law as close to the manner in which the foreign court would itself have applied it. It is not a complete answer to say that Hong Kong courts can always receive expert evidence on foreign law dealing with financial provisions on divorce. Unlike foreign rules of contract or tort encountered in the Hong Kong courts which are likely to be more "black-letter" in nature and more susceptible to adversarial adjudication between competing expert witnesses, rules governing financial provision in divorce cases are very often highly flexible and discretionary in nature, and call for great experience and familiarity with not only the black letter rules but the legal and social culture within which those rules are administered, as the social background of the parties is a very relevant consideration. It is therefore doubtful whether, with the best will in the world, Hong Kong courts can satisfactorily administer the many-and-varied financial provision regimes prevailing in other parts of the world.

For the above reasons, we do not believe that a sufficient case has been made out for enabling or allowing Hong Kong courts to apply foreign law in maintenance cases.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : N/A.

Czech Republic – République tchèque : N/A.

Estonia – Estonie : N/A.

France : N/A.

Germany – Allemagne : N/A.

Greece – Grèce : N/A.

Iceland – Islande :

No. Iceland would be very reluctant to accept the idea of applying laws of a foreign country in this field. The reason for that is mainly that in Iceland maintenance applications are dealt with by speedy and efficient administrative procedure and applying foreign law is hardly an option under those circumstances.

Ireland – Irlande :

It could be contemplated but the advantages of such a change would have to outweigh the disadvantages which would arise from a requirement for the Courts to apply foreign law. The disadvantages would include the resulting complexity for our Courts and for the legal profession. The majority of maintenance orders in Ireland are made by the District Court, which is a Court of local and limited jurisdiction. Furthermore, District Courts are located in

almost every town in Ireland. This dispersal, coupled with the infrequency of foreign maintenance orders, means that there would not be a build up of experience in the application of the law of foreign countries. Added complexity would also have implications for both the cost of dealing with applications for maintenance orders and the speed of granting them.

Any requirement to apply foreign law should be accompanied by procedures which would assist in its application, provide certainty in relation to its content. A mechanism facilitating proof of foreign law would be essential.

Italy – Italie : N/A.

Japan – Japon : N/A.

Latvia – Lettonie : N/A.

Lithuania – Lituanie : N/A.

Luxembourg : N/A.

Mexico – Mexique : Yes.

Morocco – Maroc : N/A.

Netherlands – Pays-Bas : N/A.

New Zealand – Nouvelle-Zélande : N/A.

Poland – Pologne : N/A.

Portugal : N/A.

Romania – Roumanie : N/A.

Slovak Republic – République slovaque : N/A.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Oui.

Switzerland – Suisse : N/A.

Ukraine : Yes.

United Kingdom – Royaume-Uni :

No. Applicable law rules divide common-law and civil-law jurisdictions and it is difficult to see how a consensus between them can be achieved. In addition, applying the law of a foreign jurisdiction implies considerable practical difficulty and cost, which is surely to be avoided in any new instrument. The future Hague Convention therefore should not include applicable law rules.

United States of America – Etats-Unis d'Amérique :

Generally No. However, there might be room for a special rule or two on the entitlement to maintenance, but not on the amount. It is possible that the United States might be able to agree to a rule that foreign law could be applied to determine eligibility for maintenance in a case where we could not enforce a foreign support order (because, for example, the foreign tribunal based its jurisdiction on a ground not recognizable in the United States)

and under our law the person would not be entitled to maintenance. Such a rule would likely require that the application for maintenance be accompanied by a certificate from the foreign tribunal or central authority indicating that under foreign law the person seeking maintenance was entitled to it.

If you answered NO to question 2), you are not required to answer the following questions.	**Si vous avez répondu par NON à la question 2), vous n'êtes pas tenus de répondre aux questions suivantes.**

Question 3	
If you answered YES to question 2), would your country be interested in the introduction of an optional section on applicable law within the framework of the new Convention?	**Si vous avez répondu par OUI à la question 2), votre pays serait-il intéressé à l'introduction d'une section facultative sur la loi applicable dans le cadre de la nouvelle Convention ?**

Australia – Australie : N/A.

Austria – Autriche : N/A.

Brazil – Brésil : N/A.

We would not be against an optional section because our conflicts' rule is too broad and do not contemplate all the sides of the situation.

It should be established as an optional section, without prejudice to any decision we may make in relation to taking part or not in such an optional system.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Il n'y a pas d'objection à l'introduction d'une section facultative sur le droit applicable dans le cadre de la nouvelle Convention.

Common Law provinces and territories and Civil Law Province of Quebec
There is no objection to the development of an optional section on applicable law within the framework of the new Convention.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : N/A.

Czech Republic – République tchèque :

We are interested in the introduction of conflict rules into the new Convention.

Estonia – Estonie : N/A.

France : N/A.

Germany – Allemagne : N/A.

Greece – Grèce : N/A.

Iceland – Islande : N/A.

Ireland – Irlande:

An optional section may be a solution, without prejudice to any decision we may make in relation to taking part or not in such an optional system.

Italy – Italie : N/A.

Japan – Japon : N/A.

Latvia – Lettonie : N/A.

Lithuania – Lituanie : Yes.

Luxembourg : N/A.

Mexico – Mexique : Yes.

Morocco – Maroc : N/A.

Netherlands – Pays-Bas : Oui.

New Zealand – Nouvelle-Zélande : N/A.

Poland – Pologne **:**

Portugal : N/A.

Yes. We support worldwide unification of conflict of law rules in the field of maintenance obligations which would enable international harmonization of judicial decisions. In our opinion the best solution would be the accession to the Convention of all Member States of the European Union and as many third states as possible.

Romania – Roumanie : Oui / Yes.

Slovak Republic – République slovaque : N/A.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Oui.

Switzerland – Suisse : Yes.

Ukraine : Yes.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique :

It would not be feasible for the United States to become a party to any comprehensive optional applicable law section in the new convention, since our system could not operate if anything other than forum law is applicable. The United States has no objection in principle if others would find it useful to include a comprehensive optional section or protocol on this topic. Because any comprehensive rules on this topic would be optional, we think it appropriate and efficient that most of the work on this topic continue to be done by the Applicable Law Committee. Since we would not be able to adopt a comprehensive applicable law section, we do not feel that it is appropriate to comment on the provisions such a section should contain and therefore we have not answered the remaining questions.

However, we do feel that it may be possible to include a few, specific mandatory applicable law rules in the Convention. Possibilities include:

A. A rule applying the longer statute of limitations for enforcing the support order.

B. A rule indicating that the duration of the support order is governed by the law of the place that issued the support order.

C. A rule that applies the law of the place that issued the support order to determine the rights of public bodies.

D. A rule that applies the law of the place that issued the support order to determine computation and payment of arrearages and the accrual of interest on arrearages.

2. Primary connecting factor – Rattachement principal

Introductory Remarks – Commentaires liminaires	
Pursuant to the 1973 Applicable Law Convention, maintenance obligations are governed in principle by the law of the country of the maintenance creditor's habitual residence (Art. 4). According to the WGAL's report (see Work. Doc. No 13, p. 5), that principle ought to be retained within the framework of the new Convention.	*Dans le cadre de la Convention sur la loi applicable de 1973, les obligations alimentaires sont régies en principe par la loi du pays de la résidence habituelle du créancier d'aliments (art. 4). Selon le rapport du GTLA (cf. Doc. trav. No 13, p. 5), ce principe devrait être maintenu dans le cadre de la nouvelle Convention.*

Question 4	
Do you support the plan for a rule in principle that "the internal law of the State of the habitual residence of the person whose needs are the subject of the claim ("the creditor") shall govern the maintenance obligations referred to in this Convention"?	**Etes-vous favorable à la prévision d'une règle de principe selon laquelle « La loi interne de l'Etat de la résidence habituelle de la personne dont les besoins sont l'objet de la demande (« le créancier ») régit les obligations alimentaires visées par la présente convention » ?**

Australia – Australie : N/A.

Austria – Autriche : Yes.

Brazil – Brésil : Yes.

Canada :

Province de droit civil du Québec
Oui.
Provinces et territoires de Common Law
Pour les enfants: Oui*.
Pour les cas qui n'impliquent pas un enfant: La loi du for s'applique à moins qu'il n'y ait pas d'obligations alimentaires en vertu de cette loi. La loi de la dernière résidence commune s'applique alors.

Civil Law Province of Quebec
Yes.

Common Law Provinces and Territories
For child: Yes*.
For non child cases: Forum law should apply unless there is no entitlement pursuant to forum law, then the law of their last maintained common residence should apply*.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : Yes.

Czech Republic – République tchèque : Yes.

Estonia – Estonie : Yes.

France : Oui.

Germany – Allemagne : Yes.

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande:

While we see merit in this, it has to be considered in the context of jurisdiction. If the State of the habitual residence of the creditor does not have jurisdiction, then the concerns which we outlined in response to Question 2 would apply.

Italy – Italie : Oui.

Japan – Japon : Yes.

Latvia – Lettonie :

Latvia in principle supports that the law of habitual residence of maintenance creditor is applicable law on maintenance obligations. However, it has to be admitted that this rule according to national legislation in principle applies only as far as jurisdiction is based on the residence of the maintenance creditor.

Lithuania – Lituanie : Yes.

Luxembourg : Oui.

Mexico – Mexique : Yes.

Morocco – Maroc :

Non, car il peut y avoir contradiction entre la loi de la résidence et le droit interne marocain. Mais d'une façon générale, il est possible de répondre par non concernant la fixation de l'obligation alimentaire, c'est à dire le débiteur, et par oui concernant la fixation de son montant.

Netherlands – Pays-Bas : Oui.

New Zealand – Nouvelle-Zélande :

We support this plan in principle. However, it must be accompanied by:

- Comprehensive administrative procedures to assist a foreign court applying the law of the State where the maintenance creditor resides (for example, the certificate proposed by the working group); and/or
- Subsidiary connecting factors, to deal with situations where for various reasons proceedings cannot be taken in the creditor's own country and/or to avoid difficulties involved with applying foreign law.

Poland – Pologne : Yes.

Portugal : Yes.

Romania – Roumanie : Oui / Yes.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Oui.

Switzerland – Suisse : Yes.

Ukraine : Yes.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

Question 5	
If you answered NO to question 4), what in your view should be the primary connecting factor?	**Si vous avez répondu par NON à la question 4), quel devrait être selon vous le facteur de rattachement principal ?**

Australia – Australie : N/A.

Austria – Autriche : N/A.

Brazil – Brésil : N/A.

Canada : N/A.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : N/A.

Czech Republic – République tchèque : N/A.

Estonia – Estonie : N/A.

France : N/A.

Germany – Allemagne : N/A.

Greece – Grèce : N/A.

Iceland – Islande : N/A.

Ireland – Irlande: see response to Question 4.

Italy – Italie : N/A.

Japan – Japon : N/A.

Latvia – Lettonie : N/A.

Lithuania – Lituanie : N/A.

Luxembourg : N/A.

Mexico – Mexique : N/A.

Morocco – Maroc :

Le rattachement de la nationalité. Dans le cas de la double ou la triple nationalité, c'est le pays de résidence qui doit être pris en considération.

Netherlands – Pays-Bas : N/A.

New Zealand – Nouvelle-Zélande : N/A.

Poland – Pologne : N/A.

Portugal : N/A.

Romania – Roumanie : N/A.

Slovak Republic – République slovaque : N/A.

South Africa – Afrique du Sud : N/A.

Spain – Espagne : N/A..

Switzerland – Suisse : N/A.

Ukraine : N/A.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

3. Subsidiary connecting factors – Rattachements subsidiaries

3.1 In general – En général

Question 6	
If you answered YES to question 4), do you believe that the principle of connection with the location of the maintenance creditor's habitual residence ought to be supplemented by subsidiary connections? **Please answer YES or NO.**	**Si vous avez répondu OUI à la question 4), pensez-vous que le principe du rattachement au lieu de la résidence habituelle du créancier d'aliments devrait être complété par des rattachements subsidiaires ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : Yes.

Brazil – Brésil : Yes.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Oui*.

Common Law Provinces and Territories and Civil Law Province of Quebec
Yes*.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : Yes.

Czech Republic – République tchèque : Yes.

Estonia – Estonie : Yes.

France : Oui.

Germany – Allemagne : Yes.

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande: See response to Question 4.

Italy – Italie : Oui.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : Yes.

Luxembourg : Oui.

Mexico – Mexique : Yes.

Morocco – Maroc : N/A.

Netherlands – Pays-Bas : Oui.

New Zealand – Nouvelle-Zélande : Yes.

The default should be for a maintenance creditor to take proceedings in his or her own habitual residence, with the law of his or her habitual residence being applied. That decision should then be enforceable in another contracting state.

As an alternative to this default, the maintenance creditor should have the option of choosing to take proceedings in the habitual residence of the debtor. However, if that choice is exercised, the law of the debtor's forum should apply.

Where the default will not work, and the creditor does not voluntarily choose the debtor's forum, there should be clear rules about subsidiary connecting factors.

Possible subsidiary connecting factors could include:

- If an order obtained in the creditor's habitual residence cannot be enforced in the debtor's habitual residence, the application can be made in debtor's habitual residence, but law of maintenance creditor still applies.

  Problem – some countries will not apply foreign law.

- Application made in debtor's habitual residence, law of maintenance creditor's habitual residence governs entitlement to maintenance, law of debtor's habitual residence governs amount of maintenance awarded.

  This option allows countries reluctant to apply foreign law to apply it only to entitlement. The Central Authority in the creditor's habitual residence could provide a certificate/finding setting out the creditor's eligibility for maintenance.

- Application made in debtor's habitual residence, law of debtor's habitual residence to apply. This option should be a last resort.

Poland – Pologne : Yes.

Portugal : Yes.

Romania – Roumanie : Oui / Yes.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Oui.

Switzerland – Suisse : Yes.

Ukraine : Yes.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

3.2. Common nationality of the parties – Nationalité commune des parties

Introductory Remarks – Commentaires liminaires	
Within the framework of the 1973 Applicable Law Convention, the connection with the location of the creditor's habitual residence is supplemented by a subsidiary connection with the law of the common nationality of the parties, which becomes applicable when the creditor is unable to obtain maintenance on the basis of the law of his or her habitual residence (Art. 5). Several arguments have been raised against the use of that connection in the area of maintenance: it may seem discriminatory in certain cases; it allegedly frequently leads to the application of foreign law; it could lead to the law of a State with which there is no genuinely significant connection, in particular with respect to maintenance (see Work. Doc. No 13, p. 6).	*Dans le cadre de la Convention sur la loi applicable de 1973, le rattachement au lieu de la résidence habituelle du créancier est complété par un rattachement subsidiaire à la loi de la nationalité commune des parties, qui devient applicable lorsque le créancier ne peut pas obtenir d'aliment sur la base de la loi de sa résidence habituelle (art. 5). Plusieurs arguments ont été soulevés contre l'utilisation de ce rattachement dans le domaine des aliments : il pourrait apparaître comme un rattachement discriminatoire dans certains cas ; il conduirait souvent à l'application d'une loi étrangère; il compliquerait le système sans apporter le plus souvent des réels bénéfices ; il pourrait conduire à la loi d'un Etat avec lequel il n'existe aucun lien réellement significatif, notamment en matière alimentaire (*cf. *Doc. trav. No 13, p. 6).*

Question 7	
In the light of these comments, do you agree that the subsidiary connection with the common nationality of the parties should be ruled out? **Please answer YES or NO.**	**A la lumière de ces observations, êtes-vous d'accord que le rattachement subsidiaire à la nationalité commune des parties devrait être écarté ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : No (further deliberations might be necessary).

Brazil – Brésil : No. We agree with the comments of New Zealand.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Oui.

Common Law Provinces and Territories and Civil Law Province of Quebec
Yes.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : Yes.

Czech Republic – République tchèque : Yes.

Estonia – Estonie : Yes.

France : Oui.

Germany – Allemagne : Yes.

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande: Yes.

Italy – Italie : Oui.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : No.

Luxembourg : Oui.

Mexico – Mexique : No.

Morocco – Maroc : Non.

Netherlands – Pays-Bas :

Non. Le rattachement à la nationalité commune des parties, qui est également pratiqué dans d'autres domaines du d.i.p. néerlandais, présente l'avantage de la stabilité. Son inutilité n'a pas été établie.

New Zealand – Nouvelle-Zélande :

A subsidiary connection with the common nationality of the parties is not favoured. New Zealand considers there should be a genuine connection with the forum in which proceedings are taken and the law that is applied.

Poland – Pologne :

No. The common nationality of the parties is an additional basis for granting maintenance and as such, it favors the creditor. This is in accordance with the tendency in the Polish legal system aiming to strengthen the position of the maintenance creditor.

Portugal :

In principle, yes. We agree that common nationality in certain cases may not represent a significant connection with respect to maintenance and we understand the disadvantages mentioned in the Work. Doc. No 13. However, in exceptional cases it may, in fact, represent a strong cultural common ground closer to the parties' expectations than other connecting factors. Due to those reasons, we would like to further analyse the role that such a connecting factor may play in maintenance cases (see answer to question 8).

Romania – Roumanie : Non / No.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : No.

Spain – Espagne : Oui.

Switzerland – Suisse : Yes.

Ukraine : Yes.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

3.3 Lex fori *or law of the debtor's domicile – Loi du for ou du domicile du débiteur*

Introductory Remarks – Commentaires liminaires	
In addition to the maintenance creditor's habitual residence, the maintenance obligation usually has a very significant connection with the State of the debtor's domicile or habitual residence. Moreover, the authorities of that State usually have jurisdiction on the basis of the principle actor sequitur forum rei*.* *The 1973 Applicable Law Convention does not provide for a connection with the law of the debtor's domicile or residence, but makes the* lex fori *applicable when the creditor is unable to obtain maintenance from the debtor on the basis of either the law of his or her habitual residence, or the law of common nationality (Art. 6). In practice, this subsidiary connection frequently leads to application of the law of the debtor's domicile or habitual residence.* *For its part, the 1989 Inter-American Montevideo Convention on Support Obligations places greater emphasis on the law of the State of the debtor's domicile or habitual residence. That law is applicable instead of that of the creditor's domicile or habitual residence if, according to the authority seized of the application, it is more favorable to the creditor (Art. 6). This solution provides more protection for the creditor than that under the 1973 Applicable Law Convention, but it has the drawback of forcing the court to ascertain in every case the contents of two different laws and compare them, before making its determination.* *In order to find a solution that would provide adequate protection of the creditor's interests without making the task of the competent authority too involved, the WGAL contemplated granting*	*Outre la résidence habituelle du créancier d'aliments, l'obligation alimentaire présente généralement un lien très significatif avec l'Etat du domicile ou de la résidence habituelle du débiteur. De plus, les autorités de cet Etat sont généralement compétentes sur la base du principe* actor sequitur forum rei*.* *La Convention sur la loi applicable de 1973 ne prévoit pas de rattachement à la loi du domicile ou de la résidence du débiteur, mais elle rend applicable la loi du for lorsque le créancier ne peut obtenir d'aliments ni selon la loi du lieu de sa résidence habituelle, ni selon la loi de la nationalité commune (art. 6). En pratique, ce rattachement subsidiaire conduit souvent à l'application de la loi du domicile ou de la résidence habituelle du débiteur.* *Pour sa part, la Convention interaméricaine sur les obligations alimentaires de Montevideo de 1989 accorde une plus grande place à la loi de l'Etat du domicile ou de la résidence habituelle du débiteur. Cette loi étant applicable au lieu de celle du domicile ou de la résidence habituelle du créancier, si, selon l'autorité saisie de la demande, elle est plus favorable au créancier (art. 6). Cette solution est plus protectrice pour le créancier que celle de la Convention sur la loi applicable de 1973, mais elle présente le désavantage d'obliger le juge à vérifier dans tous les cas le contenu de deux lois différentes et à les comparer, avant d'opérer son choix.* *Dans le but de trouver une solution qui puisse assurer une bonne protection des intérêts du créancier sans trop compliquer la tâche de l'autorité compétente, le GTLA*

the maintenance creditor a right to request application of the law of the authority seized (at least if that law is also the law of the debtor's habitual residence). This solution is more favorable to the creditor than that under Article 6 of the 1973 Applicable Law Convention. At the same time, it also meets the interests of the authorities seized of the application as they may, at the creditor's request, apply the lex fori*. As for the debtor, he or she could not object to that option, since it most commonly leads to the law applicable in his or her own State of residence.*	*a envisagé d'accorder au créancier d'aliments le droit de demander l'application de la loi de l'Etat de l'autorité saisie (au moins si cette loi coïncide avec la loi de l'Etat de la résidence habituelle du débiteur). Cette solution est plus avantageuse pour le créancier que celle de l'article 6 de la Convention sur la loi applicable de 1973. En même temps, elle correspond aussi à l'intérêt des autorités saisies de la demande, car elles pourront, à la demande du créancier, appliquer le droit du for. Quant au débiteur, il ne pourrait rien objecter à cette option, car elle conduit, le plus souvent, à la loi applicable dans son propre Etat de résidence.*

Question 8	
In the light of these considerations, do you believe that a rule should be introduced into the new instrument whereby, as an exception to the primary connection with the creditor's habitual residence, the creditor may, in the maintenance application, designate the domestic law of the authority seized? **Please answer YES or NO.**	**A la lumière de ces considérations, pensez-vous que l'on devrait introduire dans le nouvel instrument une règle selon laquelle, en dérogation au rattachement principal à la résidence habituelle du créancier, ce dernier peut, dans sa demande d'aliments, désigner la loi interne de l'autorité saisie ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : No (a designation of the applicable law by the creditor who is not represented by a lawyer may be detrimental for him/her).

Brazil – Brésil :

Yes. As a participant in the Inter-American Convention, this rule would be in accordance with our commitment to other latin-american countries.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Oui.

Common Law Provinces and Territories and Civil Law Province of Quebec
Yes.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : Yes.

Czech Republic – République tchèque : No.

Estonia – Estonie : Yes.

France : Non.

Germany – Allemagne :

Such a right to choose is not unproblematic since it would be even more favourable to the creditor than the Hague Maintenance Convention of 1973. It does make a difference whether the *lex fori* can only be applied as an alternative if no maintenance claim exists under the primary rule, or whether the creditor may opt for the *lex fori* from the outset. Furthermore, additional problems arise in the case of applications for variation of an order. Against this background, such a right to choose should not be accepted too rashly.

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande: Yes.

Italy – Italie : Non.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : No.

Luxembourg : Oui.

Mexico – Mexique : Yes.

Morocco – Maroc : Non.

Netherlands – Pays-Bas :

Un choix de la loi applicable ne devrait pas être possible dans le cas d'une demande d'aliments pour enfants. Le rattachement à la loi de la résidence habituelle présente l'avantage que l'obligation alimentaire envers les enfants ayant leur résidence habituelle dans un même pays est détermine selon la même loi. (Voir cependant la réponse no. 13).

New Zealand – Nouvelle-Zélande :

Yes, but only if there is a genuine connection with the authority seized, for example that of the debtor's residence. The law of the forum seized must then apply.

We query whether provisions in the Convention regarding legal expenses should apply if the creditor chooses to take proceedings outside of their habitual residence.

Poland – Pologne :

Yes. However, the question remains whether the rule should be subsidiary to the main connecting factor or alternative.

Portugal :

This choice would present an advantage, as applying the *lex fori* would simplify the procedure and thus, most probably, would make it faster. We could, in principle, accept the choice of the debtor's habitual residence law where it is also the *lex fori*. However, we would be reluctant to accept the unilateral choice of any other law (*lex fori*), where the

maintenance proceedings are not ancillary to other proceedings. Further thought could be given to special situations, *e.g.* in divorce proceedings whether the law of the common nationality of the parties could not be acceptable where it is also the *lex fori*.

Romania – Roumanie : Oui / Yes.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Oui.

Switzerland – Suisse : No answer.

Ukraine : Yes.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

Question 9	
If you answered NO to question 8), do you believe that a subsidiary rule corresponding to Article 6 of the 1973 Applicable Law Convention, whereby the internal law of the authority seized becomes applicable if the creditor is unable to obtain maintenance by virtue of the principal law applicable, should be retained?	Si vous avez répondu par NON à la question 8, pensez-vous que l'on devrait maintenir une règle subsidiaire correspondante à l'article 6 de la Convention sur la loi applicable de 1973, selon laquelle la loi interne de l'autorité saisie devient applicable lorsque le créancier ne peut pas obtenir d'aliments selon la loi applicable à titre principal ?

Australia – Australie : N/A.

Austria – Autriche : No.

Brazil – Brésil : N/A.

Canada : N/A.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : N/A.

Czech Republic – République tchèque : Yes.

Estonia – Estonie : N/A.

France : Oui.

Germany – Allemagne :

Should the right to choose under No 8) not be accepted, the subsidiary application of the *lex fori* would be necessary.

Greece – Grèce : N/A.

Iceland – Islande : N/A.

Ireland – Irlande: N/A.

Italy – Italie : Oui.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : N/A.

Lithuania – Lituanie : Yes.

Luxembourg : N/A.

Mexico – Mexique : N/A.

Morocco – Maroc : Non.

Netherlands – Pays-Bas : Oui.

New Zealand – Nouvelle-Zélande : N/A.

Poland – Pologne : N/A.

Portugal : N/A.

Romania – Roumanie : N/A.

Slovak Republic – République slovaque : N/A.

South Africa – Afrique du Sud : N/A.

Spain – Espagne :

Une règle comme l'art. 6 doit s'inclure pour les cas où il n'y a pas de désignation

Switzerland – Suisse : Yes.

Ukraine : N/A.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

4. Special conflict rules – Règles de conflit spéciales

4.1 Divorced spouses – Epoux divorcés

Introductory Remarks – Commentaires liminaires	
The 1973 Applicable Law Convention applies a specific rule to maintenance obligations between divorced spouses, which are governed, under Article 8, by the law governing the divorce. This solution applies not only when the maintenance application is determined in the course of the divorce proceedings (or	*La Convention sur la loi applicable de 1973 consacre une règle spéciale aux obligations alimentaires entre époux divorcés, ces dernières étant régies, selon l'article 8, par la loi régissant le divorce. Cette solution s'applique non seulement lorsque la demande d'aliments est tranchée dans le cadre de la procédure de*

at the time of divorce), but also in the case of any subsequent revision or amendment of decisions relating to maintenance obligations between divorced spouses, in particular in case of a claim supplementary to a divorce judgment delivered abroad. This special rule does have advantages (application of a single law to the divorce and the maintenance; observance of agreements made between the spouses at the time of divorce), but it also has several shortcomings (absence of protection for the maintenance creditor if the law of divorce is not favorable to him or her; absence of international standardisation owing to the absence of uniform conflict rules with respect to divorce; crystallisation of the applicable law despite changes in circumstances after the divorce; difficulty of detecting in the judgment the law by virtue of which the divorce was pronounced; see Work. Doc. No 13, pp. 7-8). For these reasons, several members of the WGAL have stated a preference for the elimination of this special connection.	*divorce (ou au moment du divorce), mais également dans le cas de toute révision ou modification ultérieure de décisions concernant les obligations alimentaires entre époux divorcés, notamment en cas d'action complémentaire à un jugement de divorce rendu à l'étranger. Cette règle spéciale a certes des avantages (application d'une loi unique au divorce et aux aliments ; respect des accords conclus entre les époux au moment du divorce), mais elle présente aussi diverses faiblesses (défaut de protection pour le créancier d'aliments si la loi du divorce ne lui est pas favorable ; défaut d'uniformisation au niveau international en raison de l'absence de règles uniformes de conflit en matière de divorce ; cristallisation de la loi applicable malgré la modification des circonstances après le divorce ; difficulté de déceler dans le jugement la loi en vertu de laquelle le divorce a été prononcé ; (cf. Doc. trav. No 13, pp. 7-8). Pour ces raisons, plusieurs membres du GTLA se sont exprimés en faveur de la suppression de ce rattachement spécial.*

Question 10	
In the light of these considerations, do you agree that maintenance obligations between divorced spouses should not be subject to a special rule, but be subject to the general connecting factors (law of the creditor's habitual residence, possibly subsidiary connections)? **Please answer YES or NO.**	**A la lumière de ces considérations, êtes-vous d'accord que les obligations alimentaires entre époux divorcés ne devraient pas faire l'objet d'une règle spéciale, mais être soumises aux rattachements généraux (loi de la résidence habituelle du créancier, év. rattachement subsidiaires) ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche :

No, the connection with the divorce should be kept.

Brazil – Brésil :

Yes. Maintenance modification is always possible when there is a change in circumstances and the judge of the forum should be able to assess it, and look into the applicable law as well.

Canada :

<u>*Loi sur le divorce* fédérale</u>

Présentement, la règle dans la *Loi sur le divorce* est à l'effet que seul un juge d'une cour supérieure au Canada peut modifier une ordonnance faite en vertu de cette loi, ce qui est conforme à la règle dans la Convention de 1973. La *Loi sur le divorce* canadienne est donc la seule loi qui s'applique aux obligations alimentaires entre époux divorcés au Canada.

Federal *Divorce Act*
Actually, the rule contained in the *Divorce Act* stipulates that only a judge of a Superior Court of Canada may vary an order made under that Act, which is similar to the rule of the 1973 Convention. In consequence, the *Divorce Act* only applies to maintenance obligations to divorced spouses in Canada.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : No.

Czech Republic – République tchèque : Yes.

Estonia – Estonie : No.

France : Oui.

Germany – Allemagne : Yes.

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Oui.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : Yes.

Luxembourg :

Lorsque la question des obligations alimentaires est traitée dans le cadre du divorce, nous estimons qu'il est opportun de maintenir une règle spéciale qui permet l'application d'une même loi à la décision de divorce qui couvre en même temps, en tant que mesure accessoire du divorce, la question sur les obligations alimentaires.

Or, toute modification ou révision qui intervient par après est une décision nouvelle qui ne devrait plus être forcément soumise la règle spéciale initiale.

Il est donc proposé de limiter l'application de la règle spéciale au jugement de divorce, qui contient une mesure accessoire sur les obligations alimentaires, dans la mesure où les circonstances de rattachement auraient changé.

Mexico – Mexique : No.

Morocco – Maroc: Non.

Netherlands – Pays-Bas :

Oui, à défaut de choix de la loi applicable.

New Zealand – Nouvelle-Zélande :

In New Zealand, maintenance obligations may be determined in the context of property division. New Zealand law governing the division of relationship property provides that the court may award lump sum payments or order the transfer of property in order to redress economic disparities between the parties. Such awards or orders can then be taken into account by a court when considering spousal maintenance or child support. The Court can, at the same time as making property orders, make an order in respect of spousal maintenance or child support.

Because of the linkages between dissolution of a relationship, division of property, maintenance and child support, we consider that it may be desirable to retain a special rule. This would ensure that decisions made in the context of property division would continue to be properly reflected in maintenance orders.

However, for the reasons outlined in the questionnaire, the special rule in the 1973 Applicable Law Convention is unlikely to be appropriate.

It may be more appropriate for the special rule to only apply if:

- maintenance obligations were determined in the context of division of relationship property; and
- one party is still habitually resident in the state whose law was originally applied.

In order to avoid a connecting factor that does not vary with time, the special rule should no longer apply when neither party has a genuine connection with the state whose law was originally applied.

Poland – Pologne :

No. There is a strong link between the divorce judgment and maintenance between former spouses in Polish family law (Articles 60 and 61 of the Polish Family and Guardianship Code). The fault of the debtor is one of the determinative factors for granting maintenance (*e.g.* the spouse who is solely to blame for the breakdown of marriage has no right to maintenance). The disruption of the link between the divorce judgment and the duty of maintenance could cause problems to the Polish judicial practice.

Portugal :

Yes, we agree that the general connecting factor -law of the creditor's habitual residence- should also apply between divorced spouses. However, under many laws there is a link between the entitlement and the quantum of maintenance and the reasons for the divorce, thus the application of the same law would prevent potential problems. Furthermore, in a divorce, the property rights and other economically relevant rights of each party may be definitively and globally settled. That balance should be preserved.

The following suggestions could be helpful in achieving that aim:

1 allowing the choice of law, by mutual agreement, of the law applicable to the divorce case(see next question).

2 to accept the International Law Institute's resolution[1] by encouraging courts of States other than the State in which a settlement is reached to take such a settlement into consideration.

Romania – Roumanie : Oui / Yes.

[1] Helsinki session 1985, Annuaire pp. 295-297.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Non.

Switzerland – Suisse : Yes.

Ukraine : Yes.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

Question 11	
If you answered NO to question 10), do you believe that a special rule ought to apply solely when the maintenance is determined directly in the divorce decision or even in the event of a subsequent determination or modification of maintenance between divorced spouses?	**Si vous avez répondu par NON à la question 10), pensez-vous qu'une règle spéciale devrait s'appliquer uniquement lorsque les aliments sont fixés directement dans la décision de divorce ou même en cas de fixation ou modification ultérieure des aliments entre époux divorcés ?**

Australia – Australie : N/A.

Austria – Autriche :

The special rule should apply to all applications for maintenance whether during divorce proceedings or later.

Brazil – Brésil : N/A

Canada : N/A.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) :

A special rule ought to apply solely when the maintenance is determined directly in the divorce decision.

Czech Republic – République tchèque : N/A.

Estonia – Estonie :

When the maintenance obligation is to be settled within the framework of divorce proceedings, the law applicable to divorce should govern the maintenance obligations between the divorced spouses. Application of law governing matrimonial property could also be discussed. When the maintenance obligation between spouses is to be settled after the divorce, it should also be governed in principle by the law applicable to divorce. In our view other connecting factors should apply only in particular situations (*e.g.* the law of the divorce does not provide for maintenance, law applicable to divorce has lost all relevance with regard to maintenance obligation between spouses). However, by creating subsidiary connecting factors, consideration should be given to the interests of the maintenance

debtor. Change in the habitual residence of the maintenance creditor alone shouldn't lead to changes in conditions and extend of the maintenance obligation.

The Working Group on the Law Applicable to Maintenance Obligations has pointed out that since the conflict rules with regard to divorce are not standardized at the international level, the reference to the law of divorce favours forum shopping. For that reason we would like to suggest replacing the reference to the law of divorce with reference to concrete connecting factors (such as the last common place of residence of the spouses, their common citizenship etc.)

France : N/A.

Germany – Allemagne : N/A.

Greece – Grèce : N/A.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : N/A.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie :

Latvia believes that a special rule could be applied solely when the maintenance obligations are determined in the course of divorce or nullity proceedings of marriage. However, we consider that such a choice could be alternative. It could be possible that already before commencement of divorce or nullity proceedings of marriage, the spouses could have determined maintenance obligations according to one's country's law and thus derogation of a single law governing divorce proceedings could also be tenable solution.

Lithuania – Lituanie : N/A.

Luxembourg : N/A.

Mexico – Mexique : No answer.

Morocco – Maroc: Non.

Netherlands – Pays-Bas : N/A.

New Zealand – Nouvelle-Zélande :

If there were a special rule with the qualifications outlined above, it would only apply where maintenance decisions had originally been made in the context of a property division decision. Subsequent determinations could only be made under that law if there continued to be a genuine connection with that jurisdiction.

Poland – Pologne : Yes.

Portugal : N/A.

Romania – Roumanie : N/A.

Slovak Republic – République slovaque : N/A.

South Africa – Afrique du Sud : N/A.

Spain – Espagne :

Si les aliments sont lies à la decision de divorce, une règle spéciale semble positive. Une règle spéciale est plus difficile pour le cas d'une modification ultérieurs.

Switzerland – Suisse : N/A.

Ukraine : N/A.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

4.2 Choice of law applicable to maintenance obligations between spouses – Election de la loi applicable pour les obligations alimentaires entre époux

Introductory Remarks – Commentaires liminaires	
Maintenance obligations between spouses are sometimes governed by agreements made between the parties concerned before or after marriage or at the time of divorce. In order to secure observance of these obligations, it might be interesting to allow the spouses an option to choose the law applicable to their agreement. The choice of applicable law could also assist in the application of a single law to all the property aspects of marriage (matrimonial property regime, upkeep of assets, etc.).	*Les obligations alimentaires entre époux sont parfois réglées par des conventions conclues entre les intéressés avant ou après le mariage ou bien au moment du divorce. Pour assurer le respect de ces obligations, il pourrait être intéressant d'accorder aux époux la faculté de choisir la loi applicable à leur accord. L'élection de la loi applicable pourrait également favoriser l'application d'une loi unique à tous les aspects patrimoniaux du mariage (régime matrimonial, entretien, etc.).*

Question 12	
Do you support giving the spouses an option to choose the law applicable to the maintenance obligation? **Please answer YES or NO.**	**Etes-vous favorable à accorder aux époux la faculté de désigner la loi applicable à l'obligation alimentaire ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : Yes.

Brazil – Brésil : Yes.

We support New Zealand's position.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law et *Loi sur le divorce* fédérale
Non.

Common Law Provinces and Territories and Civil Law Province of Quebec and federal *Divorce Act*
No.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : No.

Czech Republic – République tchèque : Yes.

Estonia – Estonie : Yes.

France : Non.

Germany – Allemagne : Yes.

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Non.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : No.

Luxembourg : Non.

Mexico – Mexique : Yes.

Morocco – Maroc: Non.

Netherlands – Pays-Bas :

Oui, à condition que la désignation soit expresse et qu'elle soit faite en vue de la procédure en question.

New Zealand – Nouvelle-Zélande :

Yes. However there must be genuine connecting factors between the parties and the forum chosen. There must also be mechanisms to protect a vulnerable party in the event that there is a power imbalance in the relationship.

One mechanism for protecting vulnerable parties may be to require that each party obtain independent legal advice before entering into such a choice of law agreement, for the agreement to be enforceable. If independent legal advice was not obtained the agreement should not be enforceable.

Poland – Pologne : Yes.

Portugal :

Yes but that choice should be made in connection to proceedings and the formal requirements of such a choice should be carefully analysed.

Romania – Roumanie : Oui / Yes.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Oui.

Switzerland – Suisse : No.

Ukraine : No.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

Question 13	
If that choice of law were to be accepted, do you think that it should extend to maintenance claims for children? **Please answer YES or NO.**	**Si cette élection de la loi applicable devait être admise, êtes-vous d'avis qu'elle devrait être étendue aux réclamations d'aliments pour enfants ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : No.

Brazil – Brésil : No.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law et *Loi sur le divorce* fédérale
Non.

Common Law Provinces and Territories and Civil Law Province of Quebec and federal *Divorce Act*
No.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : No.

Czech Republic – République tchèque : No.

Estonia – Estonie : No.

France : Non.

Germany – Allemagne :

The choice of law should also be considered with regard to children. Complex family law situations could then be evaluated under a single law. Possibly, a provision is necessary which provides that the choice of law must not negatively affect third parties.

Greece – Grèce : Non.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Pas de réponse.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : No.

Lithuania – Lituanie : No.

Luxembourg : Pas de réponse.

Mexico – Mexique : Yes.

Morocco – Maroc: Non.

Netherlands – Pays-Bas : Non. Voir la réponse à la question no. 8.

New Zealand – Nouvelle-Zélande :

Yes, if there is a mechanism for protecting vulnerable parties.

Poland – Pologne :

Yes, but only with restrictions. The application of one law to the entirety of financial relationships within a family would certainly have many advantages. However, if the choice of law was to become effective in relation to children (third parties), one should envisage a mechanism which would enable the judge to control whether the chosen law was not less favorable to the child.

Portugal :

We understand the advantages of submitting to a single law all the economic aspects concerning the family, in a divorce situation. However, we are afraid that under certain circumstances the interest of a global agreement in what regards the divorce may take precedence over the supreme interest of the child. Thus, for the moment the answer is negative but we will further analyse the issue.

Romania – Roumanie : Oui / Yes.

Slovak Republic – République slovaque : No.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Oui.

Switzerland – Suisse : No.

Ukraine : No.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

Question 14	
If the choice of applicable law under question 12) were to be accepted, do you believe that it should be limited to certain options (*e.g.*, law applicable to matrimonial property regime, or *lex fori*), and if so, which?	**Si l'élection de la loi applicable à la question 12) devait être admise, pensez-vous qu'elle devrait être limitée à certaines options (par ex., la loi applicable au régime matrimonial, ou loi du for), et si oui, lesquelles ?**

Australia – Australie : N/A.

Austria – Autriche :

Yes, to protect the weaker party (*lex fori*).

Brazil – Brésil : Yes.

We support Canada's and New Zealand's position.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Oui. La loi applicable devrait être limitée, par exemple, à une loi qui a un lien substantiel avec les faits en cause.

Common Law Provinces and Territories and Civil Law Province of Quebec
Yes. It should be limited, for example to a law that has a substantial connection with the case.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : Yes.

Czech Republic – République tchèque :

The choice of law should be limited to the possibility of choosing the law of the state where the person obliged to pay the maintenance is domiciled, or the law of the state of which the maintenance creditor and the person obliged to pay the maintenance had their last common residence.

Estonia – Estonie :

Yes, provided that the law applicable to maintenance obligation is the law of divorce, options could be either the law applicable to matrimonial property regime, the law of the habitual residence of one spouse or the law of citizenship of one spouse.

France : Non.

Germany – Allemagne :

Yes. The parties should be able to choose either one of the laws of their nationality or the law of one of their habitual residences. In addition, the parties could be allowed to choose the *lex fori*.

Greece – Grèce : Non.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Pas de réponse.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie :

Latvia believes that limitations related to choice of applicable law could be considered and certain specific options could be contemplated, particularly, such option as *lex fori* as well as law applicable to matrimonial property regime.

Lithuania – Lituanie : No answer.

Luxembourg : Pas de réponse.

Mexico – Mexique : Yes.

Morocco – Maroc: Pas de réponse.

Netherlands – Pays-Bas :

Oui, elle devrait être limitée à la loi du for.

New Zealand – Nouvelle-Zélande :

Yes. As stated above, there must be specified limitations designed to ensure that there is a genuine connection between the forum chosen and the parties.

Poland – Pologne :

The choice of law between spouses should be limited to the law applicable to matrimonial property only. As to the choice of *lex fori*, we think that it should be introduced as a general connecting factor and not only be restricted to spouses (see answer to question 8).

Portugal :

Yes. In addition to the laws that may be available to the defendant, the parties could be allowed to choose the law applicable to the divorce itself or to the matrimonial regime, or the *lex fori*.

Romania – Roumanie : N/A.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : The law opted fort must be the law applicable to their agreement in *toto*.

Spain – Espagne :

Oui. Résidence habituelle, loi du for, loi applicable au regime matrimonial, nationalité commune.

Switzerland – Suisse : No answer.

Ukraine : No answer.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

4.3 Persons related collaterally or by affinity – Collatéraux et allies

Introductory Remarks – Commentaires liminaires	
Article 7 of the 1973 Applicable Law Convention currently contains a special rule relating to maintenance obligations between persons related collaterally or by affinity. That rule allows the debtor to object to a claim based on the generally-applicable rules relating to applicable law on the grounds that there is no maintenance obligation under the law of the common nationality of the debtor and creditor or, in the absence of common nationality, under the internal law of the debtor's habitual residence. The WGAL proposed retention of a special rule for maintenance obligations between persons related collaterally or by affinity, on the grounds that the principle of favor creditoris *that inspired the general rules on applicable law cannot be extended directly to such specific cases. It nevertheless suggested certain amendments (restriction of the scope of the special rule to the situations where the creditor is an adult; possibly deletion of the reference to the law of common nationality; see Work. Doc. No 13, p. 9).*	*Une règle particulière relative aux obligations alimentaires entre collatéraux ou alliés figure actuellement à l'article 7 de la Convention sur la loi applicable de 1973. Cette règle permet au débiteur de s'opposer à une demande fondée sur les règles de droit commun concernant la loi applicable au motif qu'il n'existe aucune obligation alimentaire selon la loi nationale commune du débiteur et du créancier ou, en l'absence de nationalité commune, selon la loi interne de la résidence habituelle du débiteur. Le GTLA a proposé le maintien d'une règle spéciale pour les obligations alimentaires entre collatéraux ou alliés, du fait que le principe de* favor creditoris *qui inspire les règles générales sur la loi applicable ne peut être transposé directement à de telles situations particulières. Il a néanmoins proposé certaines modifications (restriction du champ d'application de la règle spéciale aux situations où le créancier est un adulte ; év. suppression de la référence à la loi nationale commune : cf.* Doc. trav. No 13, p. 9).

Question 15	
In the light of these considerations, do you support the retention of a special rule for maintenance obligations between persons related collaterally or by affinity? **Please answer YES or NO.**	**A la lumière de ces considérations, êtes-vous favorable au maintien d'une règle spéciale pour les obligations alimentaires entre collatéraux ou alliés ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : No.

Brazil – Brésil : No.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Oui.

Common Law Provinces and Territories and Civil Law Province of Quebec
Yes.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : Yes.

Czech Republic – République tchèque : Yes.

Estonia – Estonie : Yes.

France : Oui.

Germany – Allemagne : Yes

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Oui.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : Yes.

Luxembourg : Oui.

Mexico – Mexique : No.

Morocco – Maroc: Non.

Netherlands – Pays-Bas : Oui.

New Zealand – Nouvelle-Zélande :

New Zealand only has experience of enforcing orders for spousal or child maintenance. We would be grateful if the Permanent Bureau could provide information on or examples of the other types of relationships in respect of which maintenance obligations may arise.

New Zealand would like to express a view on this issue once such further information is available.

Poland – Pologne : No.

Portugal : Yes.

Romania – Roumanie : Oui / Yes.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Oui.

Switzerland – Suisse : Yes.

Ukraine : Yes.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

Question 16	
If you answered YES to question 15), do you support the deletion of the reference to the law of the parties' common nationality? **Please answer YES or NO.**	**Si vous avez répondu par OUI à la question 15), êtes-vous favorable à la suppression de la référence à la loi nationale commune des parties ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : N/A.

Brazil – Brésil : N/A.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Oui.

Common Law Provinces and Territories and Civil Law Province of Quebec
Yes.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : Yes.

Czech Republic – République tchèque : Yes.

Estonia – Estonie : No.

France : Oui.

Germany – Allemagne : Yes. The provision could be additionally restricted. It should only apply if the relevant maintenance law is the law of the creditor's habitual residence. This would give more appropriate consideration to the idea of reciprocity which is behind this provision.

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Non.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : Yes.

Luxembourg : Non.

Mexico – Mexique : N/A.

Morocco – Maroc: N/A.

Netherlands – Pays-Bas : Oui.

New Zealand – Nouvelle-Zélande : N/A.

Poland – Pologne : N/A.

Portugal :

In our view the rule should be re-drafted. However, we are still considering whether there would be an interest in retaining the reference to common nationality because it could also function as an additional basis for refusal of maintenance in certain situations where the only genuine and stable connection is exactly the common nationality. In fact, the debtor could be allowed to oppose the maintenance claim either under the law of its habitual residence or the law of their common nationality. In certain cases of collateral maintenance this would be in conformity with the parties legitimate expectations.

Romania – Roumanie : Non / No.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : Yes (see answer to question 7 above).

Spain – Espagne : Oui.

Switzerland – Suisse : Yes.

Ukraine : No.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

Question 17	
If you answered YES to question 15), do you believe that the special rule should be restricted to the situations where the creditor is an adult? **Please answer YES or NO.**	**Si vous avez répondu par OUI à la question 15), êtes-vous favorable à limiter l'application de cette règle aux situations où le créancier est un adulte ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : N/A.

Brazil – Brésil : N/A.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Non.

Common Law Provinces and Territories and Civil Law Province of Quebec
No.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : Yes.

Czech Republic – République tchèque : Yes.

Estonia – Estonie : Yes.

France : Non.

Germany – Allemagne : No.

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Non.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : No.

Luxembourg : Non.

Mexico – Mexique : N/A.

Morocco – Maroc: N/A.

Netherlands – Pays-Bas : Non. Voir la réponse à la question no. 7.

New Zealand – Nouvelle-Zélande : N/A.

Poland – Pologne : N/A.

Portugal :

Yes, but it should also apply to adults who by reason of an impairment or insufficiency of their personal faculties are not in a position to protect their interests.

Romania – Roumanie : Non / No.

Slovak Republic – République slovaque : No.

South Africa – Afrique du Sud : No.

Spain – Espagne : Non.

Switzerland – Suisse : No.

Ukraine : No.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

4.4 Public bodies – Institutions publiques

Introductory Remarks – Commentaires liminaires	
No critical comment was made in relation to Article 9 of the 1973 Applicable Law Convention whereby "the right of a public body to obtain reimbursement of benefits provided for the maintenance creditor shall be governed by the law to which the body is subject."	*Aucune remarque critique n'a été soulevée par rapport à l'article 9 de la Convention sur la loi applicable de 1973, selon lequel « le droit d'une institution publique d'obtenir le remboursement de la prestation fournie au créancier est soumis à la loi qui régit l'institution ».*

Question 18	
Do you support the retention of this rule in the new instrument? **Please answer YES or NO.**	**Etes-vous favorable au maintien de cette règle dans le nouvel instrument?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : Yes.

Brazil – Brésil :

Yes. Although Brazil does not have a tradition in this area, there is a provision in our Civil Code that allows the reimbursement of the person who advanced the alimony.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Oui.

Common Law Provinces and Territories and Civil Law Province of Quebec
Yes.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : Yes.

Czech Republic – République tchèque : Yes.

Estonia – Estonie : Yes.

France : Oui.

Germany – Allemagne : Yes.

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Oui.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : Yes.

Luxembourg : Oui.

Mexico – Mexique : No.

Morocco – Maroc: Oui.

Netherlands – Pays-Bas : Oui.

New Zealand – Nouvelle-Zélande :

Yes. One of the objects of the New Zealand Child Support Act is to ensure that the cost to the state of providing an adequate level of financial support for children and their custodians is offset by the collection of a fair contribution from non-custodial parents. Therefore, a custodian who is in receipt of certain social security benefits is obliged to apply for child support and must do so at the same time as applying for the benefit. The Government retains child support collected in these cases (up to the level of the benefit paid). Only amounts in excess of the benefit are passed onto the custodian.

Poland – Pologne : Yes.

Portugal : Yes.

Romania – Roumanie : Oui / Yes.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : No.

Spain – Espagne : Oui.

Switzerland – Suisse : Yes.

Ukraine : Yes.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

5. Scope of the applicable law – Champ d'application de la loi applicable

Introductory Remarks – Commentaires liminaires	
The scope of the applicable law is governed by Article 10 of the 1973 Applicable Law Convention. In the opinion of the WGAL this provision ought to be retained without major changes. The only change contemplated relates to the issue of determining "who is entitled to institute maintenance proceedings". Under Article 10(2), that issue is governed by the law applicable to the maintenance obligation. The wording of this rule could lead to uncertainty.	*Le champ d'application de la loi applicable est régi par l'article 10 de la Convention sur la loi applicable de 1973. De l'avis du GTLA, cette disposition devrait être maintenue sans grands changements. La seule modification qui a été envisagée concerne la question de déterminer « qui est admis à engager l'action alimentaire ». Selon l'article 10(2), cette question est régie par la loi applicable à l'obligation alimentaire. La formulation de cette règle pourrait résulter en des incertitudes.*

Question 19	
Do you support retention of a rule corresponding to Article 10(2) of the 1973 Applicable Law Convention? **Please answer YES or NO.**	**Etes-vous favorable au maintien d'une règle correspondant à l'article 10(2) de la Convention sur la loi applicable de 1973 ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : Yes.

Brazil – Brésil : N/A.

Canada :

Pas de commentaires pour le moment.

No comments for the moment.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : No.

Czech Republic – République tchèque : No.

Estonia – Estonie : Yes.

France : Oui.

Germany – Allemagne : Yes.

Greece – Grèce : Oui.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Oui.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : Yes.

Luxembourg : Oui.

Mexico – Mexique : Yes.

Morocco – Maroc:

Non, avec réserves sur les personnes non habilités à intenter une action en pension alimentaire selon notre législation.

Netherlands – Pays-Bas : Oui.

New Zealand – Nouvelle-Zélande : Yes.

Poland – Pologne : Yes.

Portugal : Yes.

Romania – Roumanie : Oui / Yes.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Oui.

Switzerland – Suisse : Yes.

Ukraine : Yes.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

Question 20	
Do you have suggestions for amendment of this rule?	**Avez-vous des propositions pour le changement de cette règle ?**

Australia – Australie : N/A.

Austria – Autriche : No (not at the moment).

Brazil – Brésil : N/A.

Canada :

Pas de commentaires pour le moment.

No comments for the moment.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : N/A.

Czech Republic – République tchèque : N/A.

Estonia – Estonie : No.

France : Pas de réponse.

Germany – Allemagne : No.

Greece – Grèce : Non.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Pas de réponse.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie :

Latvia believes that the rule could be made clearer so as to exclude references or associations with procedural capacity and representation issues in relation to proceedings, rather emphasising entitlement to benefit from the maintenance under the applicable substantive norms.

Lithuania – Lituanie : No answer.

Luxembourg : Non.

Mexico – Mexique : No answer.

Morocco – Maroc: Non.

Netherlands – Pays-Bas :

Nous soutenons le changement propose par le GTLA.

New Zealand – Nouvelle-Zélande : No.

Poland – Pologne :

From our point of view the current wording of Art. 10(2) can be retained. However, one could additionally specify that the Convention shall not apply to questions of representation at court.

Portugal : No.

Romania – Roumanie : Non / No.

Slovak Republic – République slovaque : No.

South Africa – Afrique du Sud : Let the amendments as proposed in the Special Commission be deliberated by the WGAL and come up with a final draft to be debated.

Spain – Espagne : Non.

Switzerland – Suisse : No answer.

Ukraine : No answer.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

6. Substantive rules – Règles matérielles

Introductory Remarks – Commentaires liminaires	
Under Article 11(2) of the 1973 Applicable Law Convention, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance, even if the applicable law provides otherwise. Doubts have been raised in the WGAL regarding the scope and practical usefulness of this rule (see Work. Doc. No 13, p. 10).	*Selon l'article 11(2) de la Convention sur la loi applicable de 1973, les besoins du créancier et les ressources du débiteur sont pris en compte pour déterminer le montant de la prestation alimentaire, même si la loi applicable en dispose autrement. Des doutes ont été avancés dans le GTLA quant à la portée et à l'utilité pratique de cette règle (cf. Doc. trav. No 13, p. 10).*

Question 21	
Do you believe that this rule should be deleted? **Please answer YES or NO.**	**Pensez-vous que cette règle devrait être supprimée ?** **Merci de répondre par OUI ou par NON.**

Australia – Australie : N/A.

Austria – Autriche : No.

Brazil – Brésil : No.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Oui.

Common Law Provinces and Territories and Civil Law Province of Quebec
Yes.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : No.

Czech Republic – République tchèque :

No. When deciding on the maintenance, the court must take into consideration both the needs of the creditor as well as the possibilities, abilities and property relations of the debtor. The amount of the maintenance should not exceed a level which would, when reached, place the debtor in a situation of indigence or impossibility to fulfill the maintenance obligation from an ordinary (assumed) income.

Estonia – Estonie : Yes.

France : Non.

Germany – Allemagne :

The provision should either be drafted more narrowly or be deleted.

Greece – Grèce : Non.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie :Oui.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : No.

Lithuania – Lituanie : Yes

Luxembourg : Non.

Mexico – Mexique : No.

Morocco – Maroc: Non.

Netherlands – Pays-Bas : Oui.

New Zealand – Nouvelle-Zélande : Yes.

Poland – Pologne : Yes.

Portugal :

This is a *vexata questio* in the doctrine. The provision should be re-drafted in order to clarify if it is a general principle that obliges the judge to always take into account the concrete needs of the debtor and the concrete resources of a debtor (which in an international case may be particularly important in relation to the different standards of living) or if it is only a special rule on public policy. We would favour the first approach.

Romania – Roumanie : Non / No.

Slovak Republic – République slovaque : No.

South Africa – Afrique du Sud : Yes.

Spain – Espagne : Non.

Switzerland – Suisse : No.

Ukraine : No.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

Introductory Remarks – Commentaires liminaires	
According to a suggestion made at the WGAL, another substantive rule should be included in a revised text, providing that the economic settlements between spouses should be taken into account in determining the amount of maintenance between them, even if the applicable law provides otherwise (see Work. Doc. No 13, p. 10).	*Selon une proposition avancée dans le GTLA, une autre règle matérielle devrait être incluse dans un texte révisé, prévoyant que les règlements économiques entre les époux devraient être pris en compte pour déterminer le montant des prestations alimentaires entre eux, même si la loi applicable en dispose autrement (cf. Doc. trav. No 13, p. 10).*

Question 22	
Do you support the introduction of such a rule? **Please answer YES or NO.** **If so, do you have views whether such rule should be extended to other parties, and if so, which?**	**Etes-vous favorable à l'introduction d'une telle règle ?** **Merci de répondre par OUI ou par NON.** **Si oui, êtes-vous d'avis que cette règle devrait être étendue à d'autres parties, et si oui, lesquelles ?**

Australia – Australie : N/A.

Austria – Autriche : No.

Brazil – Brésil : N/A.

Canada :

Province de droit civil du Québec et Provinces et territoires de Common Law
Non.

Common Law Provinces and Territories and Civil Law Province of Quebec
No.

China (Hong Kong Special Administrative Region) – Chine (Région Administrative Spéciale de Hongkong) : N/A.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) : No.

Czech Republic – République tchèque :

Yes, but without extension to other parties.

Estonia – Estonie : No.

France : Non.

Germany – Allemagne : No.

Greece – Grèce :

Oui. Eventuellment entre collatéraux et entre alliés.

Iceland – Islande : N/A.

Ireland – Irlande: A response is not given, in view of the answers above to Questions 2 and 3.

Italy – Italie : Non.

Japan – Japon : We cannot decide our position at this moment.

Latvia – Lettonie : Yes.

Lithuania – Lituanie : Yes.

Luxembourg : Non.

Mexico – Mexique : No.

Morocco – Maroc: Pas de réponse.

Netherlands – Pays-Bas :

Oui (première partie de la question) et non (deuxième partie de la question).

New Zealand – Nouvelle-Zélande :

We understand an economic settlement to refer to an agreement reached between the parties regarding future maintenance obligations. For example, a debtor may agree to pay the maintenance creditor a lump sum of money in return for the discharge, or reduction, of future maintenance obligations.

If this is what is meant by an economic settlement, we consider that it would be prudent to consider introducing such a rule in order to ensure that economic settlements are honoured.

If economic settlement refers to the division of relationship property in a way designed to remedy economic disparity, please refer to our answer to questions 10 and 11 above.

Poland – Pologne :

Yes. The observance of economic settlements, regardless of where the parties currently live, would be beneficial for the sake of legal clarity.

Portugal :

Yes but we do not favour its extension to other parties.

Romania – Roumanie :

Oui. Collatéraux et parents par alliance.

Yes. Collaterals and relatives by alliance.

Slovak Republic – République slovaque : Yes.

South Africa – Afrique du Sud : Yes. It should only be extended to spouses and children.

Spain – Espagne : Non..

Switzerland – Suisse : No.

Ukraine : Yes.

United Kingdom – Royaume-Uni : N/A.

United States of America – Etats-Unis d'Amérique : N/A.

Comments - Commentaires

Australia – Australie :

Australia has a primary administrative system for establishing a maintenance decision, and that system is not capable of applying foreign law. It is against our public policy for establishment decisions to be made by a court. Although a small minority of cases are determined by a court, the court is not equipped to apply foreign law

Brazil – Brésil :

Brazil is a party to the Inter-American Convention, but it is not a party to the Hague 1973 and 1956 Conventions on the Law Applicable to Maintenance Obligations.

Canada :

Le Canada n'est pas partie aux Conventions de la Haye de 1956 et de 1973 sur la loi applicable aux obligations alimentaires.

Comme règle générale, dans les provinces canadiennes de common law, l'établissement et l'exécution des obligations alimentaires dans un contexte international est basé sur les ententes bilatérales entre les provinces et les territoires et entre ces derniers et des juridictions étrangères. Les provinces et territoires canadiens de common law ont donc répondu au Questionnaire à la lumière de ces ententes*. Dans la province de droit civil du Québec, par contre, on retrouve au *Code civil* des règles sur la loi applicable aux obligations alimentaires, règles qui sont d'ailleurs inspirées de la Convention de La Haye de 1973, et c'est sur la base de ces règles qu'il a été répondu au présent questionnaire.

Les réponses aux questions reliées au divorce ont été faites en vertu de la *Loi sur le divorce* fédérale (L.R. (1985) c. 3, 2ème Supp.).

Provinces et territoires de Common Law
Application de la loi du for au quantum

Ainsi que spécifié en introduction, comme règle générale dans les provinces canadiennes de common law, l'établissement et l'exécution des obligations alimentaires dans un contexte international est basé sur les ententes bilatérales entre les provinces et les territoires et entre ces derniers et des juridictions étrangères.

Le paragraphe suivant résume les règles sur la loi applicable dans les provinces et territoires de common law pour ce qui est des demandes reçues de juridictions avec lesquelles existe une entente de réciprocité:

1. Par rapport à *l'établissement d'aliments pour un enfant*, le tribunal doit d'abord appliquer la loi de la juridiction dans laquelle l'enfant réside habituellement. Si l'octroi d'aliments n'est pas possible en vertu de cette loi, le tribunal applique alors la loi du for.

2. Pour déterminer *le montant d'aliments payable à l'enfant*, le tribunal applique la loi du for et se base sur des lignes directrices sur les pensions alimentaires pour enfants. Les lignes directrices dans les provinces et territoires de common law s'appuient sur le revenu du parent payeur. Le nombre d'enfants et d'autres facteurs sont également pris en compte.

3. Par rapport à *l'établissement et le calcul du montant d'aliments pour le demandeur* (par exemple le conjoint), le tribunal applique la loi du for. Cependant, si l'octroi d'aliments n'est pas possible en vertu de la loi du for, le tribunal applique la loi de la juridiction où le demandeur et le défendeur ont maintenu leur dernière résidence commune.

Province de droit civil du Québec et Provinces et territoires de Common Law
Il serait utile que la Convention contienne des règles spéciales concernant la fixation du montant des aliments (loi du for) et la prescription.

Provinces et territoires de Common Law
Il serait utile que la Convention contienne des règles spéciales sur la loi applicable à la durée de l'obligation alimentaire pour les enfants.

Canada is not a party to the Hague 1973 and 1956 Conventions on the Law Applicable to Maintenance Obligations.

As a general rule in the common law provinces, family support establishment and enforcement in an international context is based on bilateral reciprocal arrangements between the provinces and territories and foreign jurisdictions and the Questionnaire has been answered by Canadian Common Law provinces and territories in light of these arrangements*. In the civil law province of Quebec, the Civil Code deals with applicable law rules for maintenance obligations inspired by the 1973 Convention and it is on the basis of these rules that this Questionnaire was answered.

The questions related to divorce have been answered in light of the federal *Divorce Act* (R.S. 1985, c-3, 2d Supplement).

Common Law Provinces and Territories
Application of forum law to quantum
As previously said, as a general rule in the common law provinces, family support establishment and enforcement in an international context is based on bilateral reciprocal arrangements between the provinces and territories and foreign jurisdictions.

The following summarizes the applicable law provisions in the common law provinces and territories relevant to applications to establish support for children or non-child claimants from reciprocating jurisdictions:

1. With respect to *entitlement to support for a child*, the court must first apply the law of the jurisdiction in which the child is ordinarily resident, but if under that law the child is not entitled to support, the court must apply the law of the forum.

2. In deciding the *amount of support to be paid for a child*, the court must apply the law of the forum. Child support guidelines govern the court's determination of quantum. The guidelines in the common-law provinces and territories are based on the paying parent's income. The number of children and other factors are also taken into account.

3. With respect to *entitlement to and amount of support for the claimant*, (for example, spousal support) the court must apply the law of the forum, but if under the law of the forum the claimant is not entitled to support, the court must apply the law of the

jurisdiction in which the claimant and the respondent last maintained a common habitual residence.

Common Law Provinces and Territories and Civil Law Province of Quebec
It would be useful that the Convention contains specific rules on the determination of the amount of support (forum law) and limitation.

Common Law Provinces and Territories
It would be useful that the Convention contains specific applicable law rules on the duration of child support.

China (Macao Special Administrative Region) – Chine (Région Administrative Spéciale de Macao) :

The *Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children* was extended to Macao with effect from 27 December 1999 and it continued to apply to the Macao Special Administrative Region as the People's Republic of China notified the Netherlands' Ministry of Foreign Affairs, on 30 September 1999, that it would assume the responsibility for the international rights and obligations arising from the application of the Convention to the Macao Special Administrative Region.

The *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* is not applicable to the Macao Special Administrative Region.

Japan – Japon :

Japan is a party to the 1973 Applicable Law Convention and we have not faced difficulty in applying the rules provides for in the convention. However if the Working Group on applicable law or individual States make proposals on their amendment, we are willing to consider them.